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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 424

WALKER WOOD, SECRETARY OF STATE OF THE STATE OF MISSISSIPPI, ET AL., APPELLANTS,

vs.

STEWART C. BROOM

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

FILED OCTOBER 3, 1932

(37,121)

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[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION

In Equity. No. 407

STEWART C. BROOM, Complainant,

v.

WALKER WOOD, Secretary of State, et al., Defendants

BILL OF COMPLAINT—Filed July 25, 1932

To the Honorable Judges of the District Court of the United States in and for the Southern District of Mississippi:

The Complainant, Stewart C. Broom, humbly complaining of and against the Defendants, Walker Wood, Secretary of State of the State of Mississippi, Greek L. Rice, Attorney General of the State of Mississippi, M. S. Conner, Governor of the State of Mississippi; W. W. Downing, Chancery Clerk and Clerk of the Board of Supervisors of Hinds County, Mississippi and Bob Neely, Mrs. H. L. Morehead and J. W. Vaughan, Election Commissioners of Hinds County, Mississippi, respectfully shows unto the Court as follows:

That the Complainant is a citizen of the United States, a citizen of Hinds County in the State of Mississippi and of the said State of Mississippi and is also a taxpayer and qualified elector in and of said County and State and under [fol. 2] the law is qualified to participate as an elector and candidate in the elections, both primary and general, to be held in the State of Mississippi in the year 1932 for the nomination and election of Representatives in Congress from the State of Mississippi, to represent said State in the National House of Representatives for the ensuing two years.

That the Defendant, Walker Wood is the duly elected, qualified and acting Secretary of State of the State of Mississippi and performs his official duties at the State Capitol in the City of Jackson, Mississippi.

That the Defendant, Greek L. Rice, is the duly elected, qualified and acting Attorney General of the State of Mississippi and performs his official duties at the said Capitol.

That the Defendant, M. S. Conner is the duly elected, qualified and acting Governor of the State of Mississippi, and performs his official duties at said Capitol.

That the Defendant, W. W. Downing, is the duly elected, qualified and acting Clerk of the Chancery Court, Clerk of the Board of Supervisors and Auditor of Hinds County in the State of Mississippi, and is also a resident citizen of said County.

That the Defendants, Bob Neely, Mrs. H. L. Morehead and J. W. Vaughan, are the duly appointed, qualified and acting Election Commissioners of Hinds County and are also resident citizens of Hinds County, Mississippi.

That this Complainant brings this suit as a citizen of the United States, a qualified elector of Hinds County in the [fol. 3] State of Mississippi, in his own right and in his own behalf and also for and on behalf of all citizens and qualified electors of Hinds County in the State of Mississippi, and also all taxpayers of said County and State and all the inhabitants of said State of Mississippi, and all interested citizens, taxpayers, electors and inhabitants of said County and of said State, similarly situated and similarly affected and for such others as may join herein.

That under the laws of the State of Mississippi governing the holding of elections, both general and primary, for the nomination and election of representatives in Congress of the United States, the duties of the Defendants herein are as follows:

The Secretary of State is required to receive the tabulated returns of all primary elections, and to preserve and keep same as records of his office, such tabulations being furnished to him by the State Executive Committee of the political party holding the primary. After general elections, the Secretary of State is required to receive the returns of the election, to tabulate said returns, and to declare therefrom the winner or person elected in said election, and to certify such fact to the Governor of the State of Mississippi, who, upon such declaration and certificate by the Secretary of State, issues to the person elected his commission. The Secretary of State is also required to

[fol. 4] furnish to the Election Commissioners for each of the eighty-two counties of the State an official ballot, the form of which shall be followed in the printing of the ballots for the general election. For all of such services, the said Secretary of State is paid from the State Treasury and out of the funds of the State, and all necessary expenses incident thereto, including stationery, stamps, clerk hire, arranging the form of official ballot and having same printed, are likewise paid from the funds of the State of Mississippi, which are contributed by this complainant and the other taxpayers of the State of Mississippi, for all of whom this suit is filed and whose interests are directly involved and affected by said acts of said Secretary of State.

That the Defendants, the Election Commissioners of Hinds County, have general charge and supervision of general elections in so far as said County is concerned for the election of members of Congress and that in holding said elections the said Election Commissioners are required to furnish printed ballots in each precinct in said County and also to furnish all necessary stationery, pens and ink and to provide voting booths and placards of instructions to voters and also are required to select or choose the managers, clerks and bailiffs for each precinct in said County and to designate one of said managers to carry the ballot boxes, printed ballots, poll books and other supplies from the Courthouse of the County to the voting precinct and re-[fol. 5] turn same after the election to the Courthouse, and are also required, after such general election to tabulate the returns and certify same to the Secretary of State. That there are more than twenty voting precincts in said County and at each of said voting precincts the services of three managers, two clerks and a bailiff are required, all of whom receive compensation on a per diem basis as fixed by statute at the rate of $1.00 per day and in addition thereto, the person who carries the official ballot boxes, poll books and other necessities is allowed $1.00 for his service, so that on each day that an election is held in said County there is required to be paid to managers, bailiffs and clerks more than $140.00 in addition to the expenses of providing voting booths, printed ballots, stationery, pens, ink, placards of instructions, tally sheets, et cetera. That in addition to the foregoing expenses said Election Commissioners are re-

quired to meet prior to said elections and revise the poll books of the County and are required to meet after the election for the purpose of tabulating returns and for their services are also allowed a per diem compensation and complainant shows that the expenses of holding both primary and general elections in said County amount to more than $500.00 for each election, and that there are eighty-two counties in the State of Mississippi and that the same expenses are incurred and paid in each County of said State for each election.

[fol. 6] That under the law the expenses of primary elections of parties who poll as much as one-third of the total vote cast at the preceding Presidential election are payable out of the general funds of each County and Complainant shows that the Democratic Party in the State of Mississippi polled the requisite number of votes at the last Presidential election and that the expenses of its primary are therefore payable, under the laws of the State of Mississippi from the general funds of the Counties and that the expenses of such primary in Hinds County are payable from the general funds of that County and will amount in the aggregate in the sum above mentioned and that the total expenses of a primary and general election in the State of Mississippi to all the Counties thereof will amount to the sum of $40,000.00 or $50,000.00 for each election.

The Defendant-, Election Commissioners are also required in general elections to print the name of the nominees of the various political parties upon the ballots and also to print thereon the name of any person who has been requested by written petition, signed by fifty qualified electors, to become a candidate for representative in the House of Representatives of the United States when said petition has been presented to said Commissioners or the member thereof designated for that purpose, not less than fifteen days before said election.

That the Defendant, Clerk of the Board of Supervisors [fol. 7] and Auditor of said County is required to issue warrants payable out of the general funds of said County to cover the expenses of said election and the expenses of said election are paid out of the general funds of the County on warrants issued by the said defendant.

Complainant shows further that the same expenses enumerated above as being incurred by the Election Com-

missioners in a general election are also incurred in a primary election, likewise payable out of said general funds, the only difference being that in a primary election the said appointment- are made and the said expenses incurred by the County Executive Committee of the political party holding the election.

The Complainant shows further that prior to the census of 1930, the State of Mississippi under the laws of the United States was entitled to eight representatives in the House of Representatives of the Congress of the United States and that the said State was divided into eight districts from each of which districts one member of Congress was elected. That after the census of 1930, under the laws of the United States, the said State of Mississippi became and was entitled to only seven representatives in the House of Congress.

That under the laws of the United States, when the number of representatives to which a State is entitled is reduced, it is required that said representatives be elected [fol. 8] from the State at large until and unless the Legislature of said State passes a valid law redistricting said State and dividing same into districts in accordance with the Constitution of the United States and the Act of Congress of August 8th, 1911, Section 3.

Complainant shows that the Legislature of the State of Mississippi at its regular 1932 Session passed what was alleged and professing to be a law redistricting the State of Mississippi and undertaking to divide same into seven districts for the election of members of the House of Representatives. The said redistricting act is known as House Bill 197 of the 1932 Act of the Legislature of the State of Mississippi, and a copy of said bill is herewith filed, marked Exhibit "A" and as such asked to be taken and considered as a part of this bill of complaint, the same as if fully copied herein.

Complainant charges that the only valid and legal law redistricting the State of Mississippi, that could be enacted by said Legislature was and is a law that it is in accordance with the Constitution and laws of the United States and that any act or purported act attempting to redistrict the State in any other manner than in conformity with the Constitution and Laws of the United States is null and void. That Article 1, Section 4, of the Constitution of the United States provides as follows:

"The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each [fol. 9] state by the Legislature thereof; but Congress may at any time by law make or alter such regulations, except as to the place of choosing senators."

That pursuant to the authority given by the above section of the Constitution of the United States, the Congress of the United States, on August 8th, 1911 by Section 3 (Election by Districts) of the Act of that date provided as follows:

"That in each state entitled under this apportionment to more than one representative, the representatives to the sixty-third and each subsequent congress shall be elected by districts composed of a contiguous and compact territory and containing as nearly as practicable an equal number of inhabitants; the said districts shall be equal to the number of representatives to which the State may be entitled in Congress, no district electing more than one representative."

Complainant charges that when Congress passed the act above quoted, in pursuance to the authority given them by the Constitution of the United States, such act became, was, and is the sole and only law with reference to the redistricting of states for the election of congressmen, and any act or purported act attempting to redistrict the state into congressional districts for the election of congressmen [fol. 10] which does not redistrict the state in conformity with said Act of Congress is void and no legal election can be held thereunder; and complainant charges further that when the number of congressmen to which a state is entitled is decreased and no valid law redistricting said state is passed, as is the case here, it becomes and is necessary under that law that representatives in the house of Congress be elected from the state at large.

In order to show the method in which said House Bill #197 professes to redistrict the State of Mississippi, there is attached hereto as Exhibit "B" a map of said State, showing and designating the districts as professed to be established by said Act, said districts marked 1, 2, 3, 4, 5, 6 and 7; and there is also attached hereto as Exhibit "C" a

certified copy of the census report for the State of Mississippi, showing the whole population of the State of Mississippi by counties, and also by districts as professed to be established by said purported bill.

Complainant further shows that under the said attempted apportionment by the Legislature of the State of Mississippi, the population of the districts attempted to be established by them are as follows, to-wit:

First District, 241,605.
Second District, 219,661.
Third District, 402,969.
Fourth District, 184,266.
Fifth District, 244,562.
Sixth District, 284,457.
Seventh District, 414,301.

[fol. 11] Complainant further charges that the State of Mississippi is an agricultural state, and that the entire state is comparatively level; that it has no natural obstructions or barriers, such as navigable streams or mountains, and that said state is easily susceptible to a division into seven continguous and compact districts, and there is no reason why a division of the state into seven contiguous and compact districts of a practically equal number of inhabitants could or should not be made.

Complainant charges that the Legislature of the State of Mississippi used no discretion or judgment in undertaking to redistrict the said state, but arbitrarily failed and neglected to redistrict said state in conformity with law, but simply combined the old seventh and eighth congressional districts, making one district of them, and left the other six districts practically as they were prior to the census of 1930.

Complainant shows and charges that as shown by the map exhibited herewith and which is a true and correct map of the State of Mississippi and the districts attempted to be established by said purported bill, the Legislature of the State of Mississippi utterly failed to divide the State of Mississippi into districts which are contiguous and compact, and which kind of division could have, as above stated, been easily and reasonably made by taking one or more counties [fol. 12] from one district and making them a part of another district, all of which is apparent on the face of the map hereto attached.

To illustrate the glaring injustice and inequality, as between the seventh district, with a population according to the recent census of 414,301, embracing fifteen counties, with the fourth district with a population of 184,266 with ten counties, gives to the fourth district more than twice the strength of the seventh district in all matters of legislation and representation in congress, including the power to tax, and disfranchises or leaves without representation 230,074 of the inhabitants of the Seventh Congressional District.

Comparing the Third District with the Second District, in the Third District, with a population of 402,969, embracing eleven counties, and the Second District, with a population of 219,661, embracing ten counties, we find 183,308 persons not represented and disfranchised. And so on through the various districts showing that the Legislature exercised no reason or discretion in laying out the districts.

The proper ratio between the seven districts under the census is 287,117. Now, the Seventh District, with a population of 414,301 has 127,184 more than its ratio. The Third District, with its population of 402,969, has 115,852 [fol. 13] more than its ratio. The First District, with a population of 241,605, has 45,512 less than its ratio. The Second District with a population of 219,661, has 67,456 less than its ratio. The Fourth District, with a population of 184,226 has 102,891 less than its ratio. The Fifth District with a population of 244,562, has 42,555 less than its ratio. The Sixth District, with a population of 284,457, has 2,660 less than its ratio. And there were and are no topographical features or conditions, or any other reason that could have produced such an unethical discrimination in the state of favoritism in certain districts.

First. The said Act, is in violation of the Constitution of the United States, and of the Act of Congress above quoted, requiring congressional districts to be contiguous, compact and as nearly as possible of equal population.

Second. The said Act is in violation of the Fourteenth Amendment of the Constitution of the United States, in that it abridges the privileges and immunities of this Complainant and all other citizens of the United States who are

also citizens of the State of Mississippi, and it denies to this complainant and other citizens of the United States resident in Mississippi the equal protection of the laws, and deprives this Complainant of property without due process of law.

Third. It violates the fundamental principles upon which the government of the State of Mississippi and of the United States is founded, to-wit: the right of equal repre- [fol. 14] sentation in the halls of congress.

Complainant would further show and charge that notwithstanding that there is no legal districting of the State of Mississippi for the election of congressmen, candidates from the districts under the proposed an illegal bill are filing their applications and paying their filing fees to get their names on the ticket to be voted upon in the August primary from the various districts outlined in said illegal bill, and in that way attempting to establish districts by holding primaries and elections under said void and illegal bill, in violation of the Constitution and Laws of the United States.

Complainant would further show that the date of the congressional primary is the fourth Tuesday in August, 1932, as fixed by law; and the general election for the election of congressmen is fixed for the first Tuesday after the first Monday in November, 1932.

Complainant would further show and charge that the above named officers are now preparing to hold a primary election in the State of Mississippi for the election of representatives in Congress under said illegal and unconstitutional bill, and that they are preparing for said election and for the expenditure of public money as above set out in the conduct of said primary elections and general elections for representatives in Congress, as above set out and that [fol. 15] said officers will hold said elections in violation of the Constitution of the United States and the Laws of the United States, unless they are enjoined, prevented and restrained by the decree of this Court; and that this Complainant's rights, privileges and immunities, acting for and in behalf of himself and all the citizens, electors and taxpayers, will be effected and disregarded and violated, un-

less said Defendants are enjoined and restrained from so doing by decree of this Court.

Complainant would further show that the said officers are attempting to hold the primary election and general election in violation of the law, the result of which would be null and void, and not only will they expend money and hold a null and void election under a void statute, thereby wasting complainant's money and public funds, but under the law it will be necessary to hold another election before legal representatives in Congress can be elected, at the expense of the public and the expense of the taxpayers of Mississippi, including your Complainant, so that before representatives in the House of Congress are legally elected in the State of Mississippi, it will be necessary to hold three elections instead of one primary and one general election.

Complainant would further show that on account of the Legislature failing and neglecting to pass a legal redistricting bill there is a great confusion and anxiety among the [fol. 16] people throughout the State, and that many suits will be filed in order to ascertain what law is applicable to apply to the confused condition brought about by the attempted legislative act of trying to elect by districts instead of the alternative method of electing from the state at large, and a muliplicity of suits can and will be avoided by this procedure, and the matter is so urgent and of such paramount public importance, and with no legal and speedy remedy at law, only a court of equity can take jurisdiction and settle the controversies.

Complainant charges that there is no law now in existence by which congressmen from Mississippi can be elected by districts, and the only law on the subject provides that seven congressmen shall be elected from the state at large, and the only valid primary and election that can be held by the defendants is a state-wide primary and a state-wide election, until and unless the Legislature reconvenes and enacts a redistricting law as provided by the Constitution of the United States and the Act of Congress.

Complainant charges further that by virtue of the Acts of Congress referred to, they claim the privilege and right to be represented in the Congress of the United States by seven representatives, duly elected by the electors of the

State from seven congressional districts duly established by the Legislature of the State of Mississippi, in accordance with and as provided by law and the Constitution; and [fol. 17] they further claim the right and privilege under said act of Congress last mentioned to have each of said seven congressional districts contain as nearly as practicable an equal number of inhabitants, and that said congressional districts shall be composed of contiguous and compact territory; but under the Act of the Legislature passed at its session in 1932 and the constructions being given to said Act by the Defendants, there is an attempt to establish districts in conflict with the acts of Congress, and thereby deprive Complainant of the right to election by a fair, equal and equitable reapportionment, and the validity or invalidity of the redistricting statute directly affects each citizen, elector, and taxpayer of the State of Mississippi.

Complainant charges that a Federal question is involved in this suit, in that the legislative act involved, redistricting the State of Mississippi, offends and violates Article 1, Section 4, of the Constitution of the United States and the Fourteenth Amendment of the Constitution of the United States and Section 3 of the Act of Congress approved August 8th, 1911, which is now in full force and effect; and this Bill of Complaint calls for a construction of the Constitution of the United States and the Acts of Congress as relates to the redistricting of the State of Mississippi as provided by the Acts of Congress of 1911. Under the last census, Mississippi's representation in Congress was re- [fol. 18] duced from eight to seven.

Complainant shows further that as aforesaid, he is a qualified elector of the State of Mississippi, in all respects qualified under the Laws of the State of Mississippi and of the United States to be and become a candidate for the office of representative in Congress from the State of Mississippi. That he is more than twenty-five years of age and has for more than seven years been a citizen of the United States and an inhabitant of the State of Mississippi. That he has never participated in rebellion or other crime. That all taxes legally required of him have been paid and were paid on or before February 1st, 1932; That he is duly registered and is in all other respects fully qualified as an elector of the State of Mississippi and as a candidate for election

as a member of the House of Representatives of the United States.

He shows further that there has been presented to the Defendant, the Election Commissioners of Hinds County or to the member of said Commission designated for such purpose, a written request signed by more than fifty qualified electors of Mississippi requesting this Complainant to become a candidate in the general election to be held on the first Tuesday after the first Monday in November, 1932 and that a similar petition has been presented to the defendant, Secretary of State of the State of Mississippi, both said petitions having been presented more than fifteen days [fol. 19] prior to said election with the request that this complainant's name be placed upon the ballot to be used in said general election as a candidate from the state at large for the office of a member of the House of Representatives of the United States from Mississippi.

Complainant charges that it was the duty of the said defendants to accept the said petitions and to place his name upon the official ballots to be used in said general election as a candidate from the state at large for such office, but that the said Defendants have declined and refused to receive or accept said petition and have declined and refused to place the name of this complainant upon the ballots as a candidate to be voted upon in said election.

Complainant charges further that to permit the public funds of the State of Mississippi and of the County of Hinds to be expended in holding a void election under the void and illegal act of the Legislature of the State of Mississippi, attempting to redistrict the State into congressional districts would be a waste of the public funds of said County and State and that nothing would be accomplished by said election and the necessary result thereof would be to have a special election called, which would necessarily incur additional expenses in the amounts hereinbefore specified, payable out of the general funds of said County and State.

Complainant shows that he has no plain, adequate and [fol. 20] speedy remedy at law; and no remedy save by this suit in equity and no remedy save in this Court, the State Courts of Miss. having held that they have no jurisdiction, either at law or in equity; That to permit the expenses of said election to be paid from said public funds would be a

waste and diversion of trust funds now in the public treasuries of Hinds County and the State of Mississippi and would result in the expenditure of said funds for an unlawful purpose.

Complainant charges that the Act of the Legislature aforesaid and the Acts of the Defendants in declining and refusing to accept his petition aforesaid, are a denial and deprivation of civil rights guaranteed to him by the Constitution and Laws of the United States and is also a denial and deprivation of the civil rights guaranteed to the inhabitants and electors of the State of Mississippi, and that unless this Court intervenes, the said Defendants will continue to deny to this Complainant and deprive him of the civil rights guaranteed to him by the Constitution and Laws of the United States and will likewise deprive the other qualified electors and inhabitants of the State of Mississippi, and especially all the inhabitants of that part of the State designated by the void act of the Legislature as the new Seventh Congressional District, of the civil rights and equal protection of the law and the right of equal representation guaranteed to them by the Constitution and the Laws of the United States.

[fol. 21] That to permit the defendants to deny to the thousands of inhabitants of said district the rights guaranteed to them by the Constitution and Laws of the United States would result in a multiplicity of lawsuits for the redress of such denial and deprivation and Complainant charges that the Court of equity has jurisdiction of this matter for the prevention of a multiplicity of lawsuits, and also has jurisdiction to prevent the unlawful expenditure of public funds under the guise of a statute that denies and deprives this complainant and other taxpayers and electors of Mississippi of the rights guaranteed to them by the Constitution and Laws of the United States and that this Court has jurisdiction to protect the privileges, immunities and rights guaranteed to this complainant and other citizens of the United States and the State of Mississippi by the said Constitution and Laws.

Wherefore, Complainant prays that summons may issue for the defendants, commanding them to appear and plead, answer or move to dismiss herein, answer under oath being waived, and the said Complainant prays that a preliminary injunction herein against the defendants may issue, enjoin-

ing and restraining them from expending any of the public funds of the State of Mississippi or the County of Hinds in or about an election held or attempted to be held in conformity with the Act of the Legislature of the State of Mississippi above mentioned, and may the Defendants, Walker [fols. 22 & 23] Wood and the Election Commissioners of the County aforesaid be enjoined and required to accept and receive the petition of this Complainant and may they be required to place his name on the official ballots to be used in the general election for the election of congressmen in November, 1932, as a candidate for a member of the House of Representatives of the United States, from the State at large; And he prays that upon final hearing said preliminary injunction may be made perpetual and he prays further that said redistricting statute of the Legislature of the State of Mississippi of 1932 may be declared violative of the Constitution and Laws of the United States and therefore invalid.

If the Complainant has prayed for wrong, improper or insufficient relief, then, pray grant him such other relief, either general or special, as the nature of the case may entitle him to receive and as in duty bound he will ever pray.

Stewart C. Broom, Complainant, by H. V. Wall, J. H. Price, J. O. S. Sanders, Chalmers Potter, P. C. Canizaro, R. L. Jones, W. S. Henley, Solicitors.

Duly sworn to by Stewart C. Broom. Jurat omitted in printing.

[fol. 24] EXHIBIT "A" TO BILL OF COMPLAINT

STATE OF MISSISSIPPI:

Office of Secretary of State, Jackson

I, Walker Wood, Secretary of State of the State of Mississippi, do hereby certify that the within and attached is a true and correct copy of House Bill No. 197, Act of the Mississippi Legislature, 1932, the enrolled act of which is now a matter of record in this office.

Given under my hand and the Great Seal of the State of Mississippi this the 22nd day of July, 1932.

Walker Wood, Secretary of State. (Seal.)

House Bill No. 197

An Act to Apportion and Redistrict the State of Mississippi Into Seven Congressional Districts and to Provide for the Election of a Congressman from Each District and to Repeal Section 6276 of the Code of 1930

Section 1. Be it enacted by the Legislature of the State of Mississippi, That the said State be, and is hereby divided into seven Congressional districts as follows:

First District: The First Congressional District shall be [fol. 25] composed of the following counties: Alcorn, Prentiss, Tishomingo, Lee, Itawamba, Monroe, Clay, Oktibbeha, Lowndes, and Noxubee.

Second District: The Second Congressional District shall be composed of the following counties: DeSoto, Marshall, Benton, Tippah, Tate, Panola, Lafayette, Union, Tallahatchie and Yalobusha.

Third District: The Third Congressional District shall be composed of the following counties: Tunica, Quitman, Coahoma, Bolivar, Washington, Sunflower, Leflore, Holmes, Humphreys, Sharkey, and Issaquena.

Fourth District: The Fourth Congressional District shall be composed of the following counties: Grenada, Chickasaw, Calhoun, Carroll, Montgomery, Webster, Choctaw, Attala, Winston, and Pontotoc.

Fifth District: The Fifth Congressional District shall be composed of the following counties: Kemper, Scott, Newton, Lauderdale, Simpson, Smith, Jasper, Clarke, Leake, and Neshoba.

Sixth District: The Sixth Congressional District shall be composed of the counties of Lawrence, Jefferson Davis, Covington, Jones, Marion, Lamar, Forrest, Perry, Greene, Pearl River, Stone, George, Hancock, Harrison, Jackson, and Wayne.

Seventh District: The Seventh Congressional District shall be composed of the following counties: Claiborne, Copiah, Jefferson, Walthall, Adams, Franklin, Lincoln, [fol. 26] Wilkinson, Amite, Pike, Rankin, Hinds, Warren, Yazoo and Madison.

Section 2. The present number of Congressmen in the House of Representatives shall continue to represent their

several districts until the expiration of the terms for which they are elected. At the regular election held in November, 1932, there shall be elected from each of the hereinbefore named districts one congressman.

Section 3. Should a vacancy by death, resignation or otherwise occur in any one or more of the eight present districts between the passage of this Act and the expiration of the terms of the present Representative in Congress, such vacancy shall be filled from the district in which such vacancy occurs in the way heretofore provided for by law the same as if this Act had not been passed.

Section 4. That Section 6276, Code of 1930, be and the same is hereby repealed.

Section 5. This Act shall take effect and be in force from and after its passage.

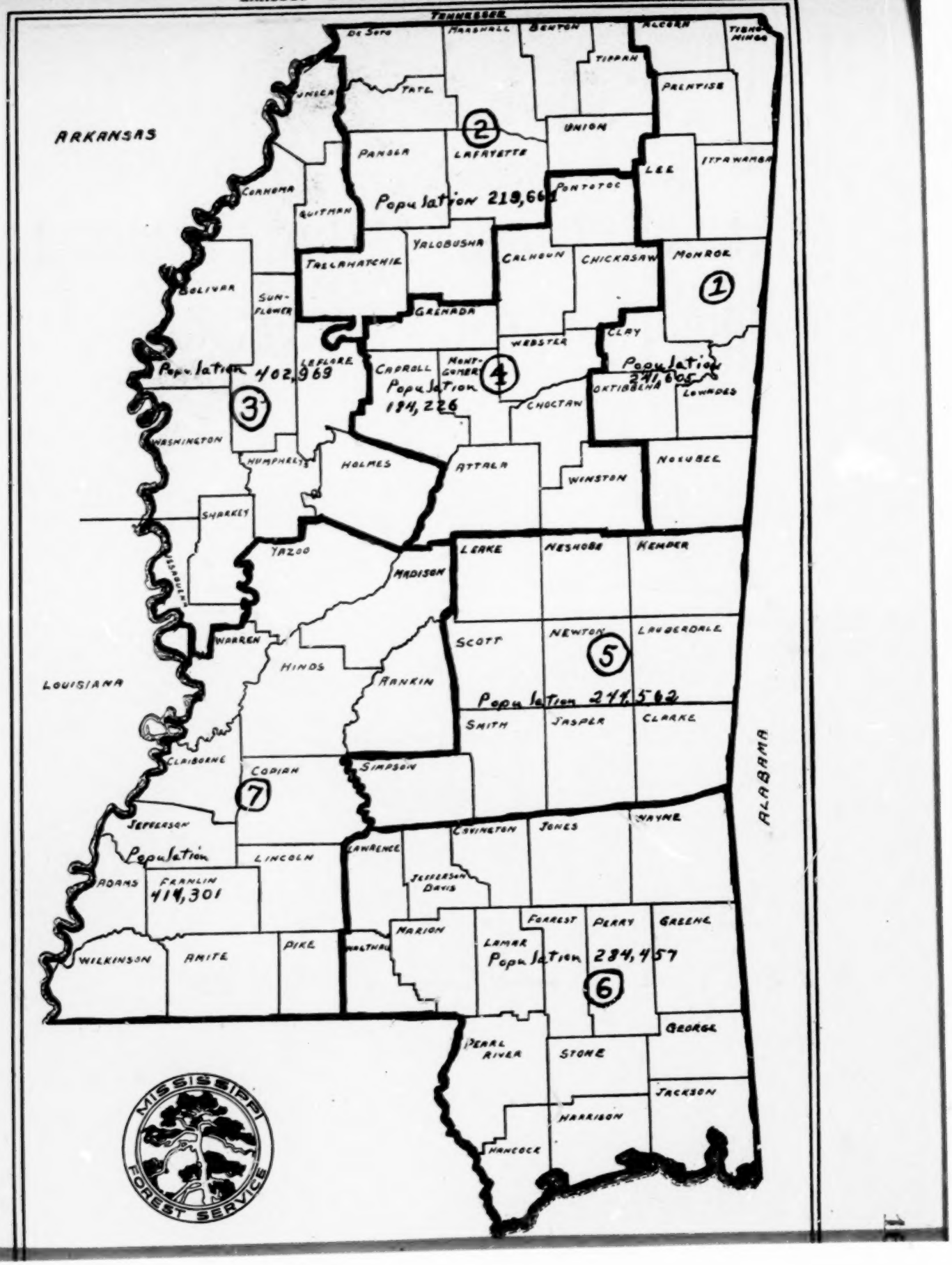
This bill having been allowed to remain on my desk for the Constitutional period of five days, has become a law without my signature, as per Section 72 of the State Constitution.

May 18, 1932.

Sennett Conner, Governor.

(Here follows Exhibit "B" to bill of complaint, side folio 27)

EXHIBIT "B" TO BILL OF COMPLAINT



[fol. 28] EXHIBIT "C" TO BILL OF COMPLAINT

Population of Mississippi by Counties as Shown in Report of Secretary of State from the Census of the United States in 1930

First District

Alcorn	23,653
Clay	17,931
Itawamba	18,225
Lee	35,313
Lowndes	29,987
Monroe	36,141
Noxubee	25,560
Oktibbeha	19,119
Prentiss	19,265
Tishomingo	16,411
Total	241,605

Second District

Benton	9,813
DeSoto	25,438
Lafayette	19,978
Marshall	24,869
Panola	28,648
Tallahatchie	35,568
Tate	17,671
Tippah	18,658
Union	21,268
Yalobusha	17,750
Total	219,661

[fol. 29]

Fifth District

Clarke	19,679
Jasper	18,634
Kemper	21,881
Lauderdale	52,748
Leake	21,803
Neshoba	26,691
Newton	22,910
Scott	20,914
Simpson	20,897
Smith	18,405
Total	244,562

Seventh District

Adams	25,564
Amite	19,712
Claiborne	12,152
Copiah	31,314
Franklin	12,268
Hinds	85,118
Jefferson	14,291
Lincoln	26,357
Madison	35,796
Pike	32,201
Rankin	20,353
Walthall	13,871
Warren	35,785
Wilkinson	13,957
Yazoo	37,262
Total	414,301

Third District

Bolivar	71,051
Coahoma	46,327
Holmes	38,534
Humphreys	24,729
Issaquena	5,734
Leflore	53,506
Quitman	25,304
Sharkey	13,877
Sunflower	66,364
Tunica	21,233
Washington	54,310
Total	402,969

Fourth District

Attala	26,035
Calhoun	18,080
Carroll	19,765
Chickasaw	20,835
Choctaw	12,339
Grenada	16,802
Montgomery	15,009
Pontotoc	22,034
Webster	12,128
Winston	21,239
Total	184,226

Sixth District

Covington	15,028
Forrest	30,115
George	7,523
Green	10,644
Hancock	11,415
Harrison	44,143
Jackson	15,973
Jeff. Davis	14,281
Jones	41,492
Lamar	12,848
Lawrence	12,471
Marion	19,923
Pearl River	19,405
Perry	8,197
Stone	5,704
Wayne	15,295
Total	284,457

[fol. 30] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER FOR ORGANIZATION OF THREE JUDGE COURT—Filed July 30, 1932

This day this cause coming on to be heard before the Court upon the application of the plaintiff for a preliminary injunction, and it appearing that one of the grounds upon which the injunction is prayed for is the alleged unconstitutionality of a statute of the State of Mississippi because in violation of the Constitution of the United States, and the Court being of the opinion that no restraining order should issue without notice to all interested parties, as required by law, and it further appearing that before any injunction should be granted under the bill and prayer for relief therein contained, it is the duty of the Court to call to its assistance two other judges, one of whom shall be a Circuit Judge:

It is ordered, adjudged, and decreed that a three judge court be organized to hear said application, as required by [fol. 31] Section 266 of the Judicial Code, to be composed of one Circuit Judge and two District Judges, and to be convened in New Orleans, Louisiana, at 10 o'clock A. M., on the 5th day of August, 1932; and it is further ordered, adjudged, and decreed that the Governor and the Attorney General of the State of Mississippi, as well as all defendants herein, be notified of said hearing, as required by law.

Ordered, adjudged, and decreed this 27th day of July, A. D. 1932.

E. R. Holmes, United States District Judge.

We accept service of notice herein for plaintiff this July 30th, 1932.

May, Sanders, McLaurin & Byrd, of Counsel for Plaintiff.

Greek L. Rice, Atty. Gen., for all Defendants named in O. B. this July 30, 1932.

Greek L. Rice, Atty. Gen., by J. A. Lauderdale, Asst. Atty. Gen.

[fol. 32] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS BILL—Filed August 4, 1932

To the Honorable Rufus E. Foster, Judge of the United States Circuit Court of Appeals for the Fifth Circuit, and Honorable Edwin R. Holmes, Judge of the District Court of the United States for the Southern District of Mississippi, and convened as a special court at New Orleans, Louisiana:

Now comes Greek L. Rice, Attorney General of the State of Mississippi, in his own behalf and in behalf of all the defendants named in the original bill and moves the court to dismiss the original bill on file herein and for grounds of said motion assigns the following, to-wit:

I. There is no equity on the face of the bill.

II. A court of equity is without jurisdiction in this case.

III. Under the facts stated in the original bill, plaintiff is not entitled, under the law, to have his name placed on the ballot as a candidate from the state at large.

IV. The decree of this court would oe inefficacious.

Respectfully submitted.

Greek L. Rice, Attorney General, and J. A. Lauderdale, Assistant Attorney General, Attorneys for Defendants.

[fol. 33] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDMENT TO BILL OF COMPLAINT

Presented to the Court and allowed to be filed August 5, 1932.

And now comes the plaintiff, after leave of court first had and obtained, filed this his amendment to his bill of complaint by inserting in the prayer thereof, just before the prayer for general relief, the following:

"And plaintiff further prays that a temporary injunction be issued by this honorable court, restraining and preventing the defendant Secretary of State from preparing and distributing to the election commissioners of the various counties of the State of Mississippi, sample ballots for use in the general election in November 1932, listing the names of candidates for the Congress of the United States from districts as defined by said House Bill 197, and requiring him to prepare and distribute said ballots for use in such election for such office from the State-at-Large; and that upon the final hearing hereof may such temporary order be made final and perpetual."

J. H. Price, Hugh V. Wall, J. O. S. Sanders, Chalmers Potter, Solicitors for Plaintiff.

[fol. 34] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING AMENDMENT, ETC.—Filed August 10, 1932

This cause this day came on for hearing on motion of plaintiff for temporary injunction on Bill of Complaint, exhibits thereto and the amendment to the prayer of the Bill and all of the parties being present in Court and represented by Counsel and the defendants making a motion to dismiss the Bill of Complaint, upon the grounds set out in said motion, and the Court having heard the argument of Counsel to dismiss the Bill of Complaint, and being advised in the premises doth order that said motion be, and the same is overruled, and Counsel for all of the defendants announced in open Court that no further pleading on the part of the defendants would be filed, and upon proof the Court finds that the allegations in said bill are true.

It is therefore ordered, a majority of the Court concur-
[fol. 35] ring, that the prayer of the Bill and the amendment thereto be and the same is hereby granted, and the defendants, and each of them, are restrained and enjoined from doing and performing any and all of the acts contained in the prayer and the amendment thereto.

It is further ordered by the Court that Walker Wood, the Secretary of State for the State of Mississippi be, and he is hereby restrained and enjoined from receiving the returns and certifying the nominees for representatives in Congress from Districts in the State of Mississippi as set out and contained in House Bill 197, known as the Congressional Redistricting Act of the Legislature of the State of Mississippi, and he is restrained and enjoined from certifying the names of any persons elected represenatives in Congress from the State of Mississippi, except those who are elected from the State at large.

It is further ordered that the election commissioners named in the Bill of Complaint of Hinds County, Mississippi, be and they are hereby restrained and enjoined from receiving any sample ballots from the Secretary of State for the State of Mississippi, containing the names of candidates for representatives in Congress by Districts as set out in House Bill 197 of the Acts of Legislature of the State of Mississippi, 1932 Session, known as the Congressional Redistricting Bill for the State of Mississippi, and it is fur- [fol. 36] ther ordered that said election commissioners be and they are hereby restrained and enjoined from certifying the returns of the election of names of any persons to the Secretary of State of the State of Mississippi for representatives in Congress, except those persons who are elected from the State at large.

It is further ordered that the Secretary of State of the State of Mississippi be and he is hereby restrained and enjoined from preparing and sending out sample ballots to be used for the election for representatives in Congress from the State of Mississippi, except for an election for representatives in Congress from the State at large.

It is further ordered by the Court that the Secretary of State of the State of Mississippi be and he is hereby restrained and enjoined from certifying to the Governor of the State of Mississippi any persons elected as representatives in Congress in the State of Mississippi, except those persons elected from the State at large.

It is further ordered that House Bill 197, known as the Congressional Redistricting Bill for the State of Mississippi at its 1932 Session, be and the same is hereby declared unconstitutional and illegal, and that no valid election can

[fol. 37] be held for representatives in Congress thereunder.

It is further ordered that the Clerk of this Court shall issue said injunction and restraining order upon the plaintiff, filing a bond in the penal sum of One Thousand ($1,000.00) Dollars, to be approved by the Clerk of this Court.

Ordered, adjudged, and decreed this day, August 5, 1932.

Rufus E. Foster, Circuit Judge. Ben C. Dawkins, District Judge.

Hugh V. Wall, J. H. Price, J. O. S. Sanders, Chalmers Potter.

O. K.

J. A. Lauderdale, Attorney for Defts.

[fol. 38] In United States District Court

[Title omitted]

Answer—Filed August 12, 1932

Now come all of the defendants in the above styled cause by Greek L. Rice, Attorney General of the State of Mississippi, and J. A. Lauderdale, Assistant Attorney General, and for answer to the original bill now on file against them say:

I

Defendants admit each and every allegation of a material fact which is well pleaded in the original bill on file herein.

Defendants do not admit the statements and conclusions of law made by plaintiffs in the original bill.

II

Defendants aver as follows:

(1) That there is no equity on the face of the bill.

(2) That under the facts stated in the bill and admitted in the answer this Court is without jurisdiction in this case.

(3) That under the facts stated in the original bill and [fol. 39] admitted in the answer, plaintiff is not entitled

under the law to have his name placed on the ballot as a candidate from the State at large.

(4) The decree of this Court would be inefficacious.

(5) House Bill No. 197, Regular Session Legislature 1932, does not contravene any provision of the Federal Constitution.

III

Defendants now having answered the allegations of the original bill on file herein pray that said temporary injunction heretofore granted by this Court be dissolved, the original bill be dismissed, and the plaintiff taxes with all costs in this behalf expended.

Greek L. Rice, Attorney General; J. A. Lauderdale, Assistant Attorney General, Attorneys for Defendants.

[fol. 40] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION SETTING DOWN FOR HEARING—Filed August 16, 1932

The defendants having answered the bill, admitting the facts of the bill, comes the plaintiff and sets this cause down for hearing on the bill, amendments and exhibits thereto, answer of the defendants, and the former preliminary restraining order of this court.

S. C. Broom, by H. V. Wall, Chal. Potter, J. O. S. Sanders, & J. H. Price, Attys.

[fol. 41] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION

No. 407

S. C. BROOM, Complainant,

v.

WALKER WOOD, Secretary of State of the State of Mississippi, et al., Defendants

FINAL DECREE—Filed August 16, 1932

This cause this day came on for final hearing on Bill of Complaint and answer filed by all of the defendants and

by consent of all the parties, the case is set down for final hearing and it appearing to the Court composed of Circuit Judge Rufus E. Foster, and District Judges, E. R. Holmes and Ben C. Dawkins, heard the cause on August 5, 1932, on motion of the complainant, Stewart C. Broom, for a preliminary injunction herein, according to the prayer and amendment thereto of his Bill of Complaint herein; and upon defendants' motion to dismiss this suit for causes therein set out, and upon the whole case it appearing that the answer filed by the defendants admits the facts set out in the Bill of Complaint, and the Court having heard the argument of the case, considered the judgment roll herein, and being advised sufficiently:

[fol. 42] It is ordered, adjudged, and decreed, a majority of the Court concurring, that the preliminary injunction heretofore granted be and the same is hereby continued and made permanent.

It is therefore ordered, adjudged, and decreed, a majority of the Court concurring, that the prayer of the Bill and the amendment thereto be and the same is hereby granted, and the defendants, and each of them, are restrained and enjoined from doing and performing any and all of the acts contained in the prayer and the amendment thereto.

It is further ordered, adjudged, and decreed by the Court that Walker Wood, the Secretary of State for the State of Mississippi be, and he is hereby restrained and enjoined from receiving the returns and certifying the nominees for representatives in Congress from Districts in the State of Mississippi as set out and contained in House Bill 197, known as the Congressional Redistricting Act of the Legislature of the State of Mississippi, and he is restrained and enjoined from certifying the names of any persons elected representatives in Congress from the State of Mississippi, except those who are elected from the State at Large.

It is further ordered, adjudged, and decreed that the election commissioners named in the Bill of Complaint of Hinds County, Mississippi, be and they are hereby re-

[fol. 43] strained and enjoined from receiving any sample ballots from the Secretary of State for the State of Mississippi, containing the names of candidates for representatives in Congress by Districts as set out in House Bill

197 of the Acts of Legislature of the State of Mississippi, 1932 Session, known as the Congressional Redistricting Bill for the State of Mississippi, and it is further ordered that said election commissioners be and they are hereby restrained and enjoined from certifying the returns of the election of names of any persons to the Secretary of State of Mississippi for representatives in Congress, except those persons who are elected from the State at large.

It is further ordered, adjudged, and decreed that the Secretary of State of the State of Mississippi be and he is hereby restrained and enjoined from preparing and sending out sample ballots to be used for the election for representatives in Congress from the State of Mississippi, except for an election for representatives in Congress from the State at large.

It is further ordered, adjudged, and decreed that the Secretary of State of the State of Mississippi be and he is hereby restrained and enjoined from certifying to the Governor of the State of Mississippi any persons elected as representatives in Congress in the State of Mississippi, except those persons elected from the State at large.

[fol. 44] It is further ordered, adjudged, and decreed that House Bill 197, known as the Congressional Redistricting Bill for the State of Mississippi at its 1932 Session, be and the same is hereby declared unconstitutional and illegal, and that no valid election can be held for representatives in Congress thereunder.

It is ordered, adjudged, and decreed by the Court that the preliminary injunction hereinbefore granted, be and it is now made perpetual, but that no costs be adjudged against the defendants.

Ordered and adjudged this the 16th day of August, 1932.

Rufus E. Foster, U. S. Circuit Judge. Ben C. Dawkins, U. S. District Judge.

Endorsed thereon:

August 18th, 1932.

Service of the writ of injunction granted by the within decree is hereby waived for all of the defendants named in said suit.

J. A. Lauderdale, Attorney for All of the Defts.

[fol. 45] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION

In Equity. No. 407

STEWART C. BROOM, Complainant,

v.

WALKER WOOD, Secretary of State, et al., Defendants

Before Foster, Circuit Judge, and Holmes and Dawkins, District Judges

OPINION—Filed September 1, 1932

FOSTER, Circuit Judge:

This is a bill brought by Stewart C. Broom, a citizen of the United States, domiciled in Mississippi, against various state officers, praying for interlocutory and final injunctions to prohibit them from acting under the provisions of House Bill No. 197 of the 1932 Acts of the Legislature of Mississippi, known as the Congressional Redistricting Act, on the ground that it violates the provisions of Art. 1, Sec. 4 of the Constitution of the United States and Sec. 3 of the Act of Congress of August 8, 1911 (Title 2 U. S. C. A. Sec. 3). The defendants, appearing through the Attorney General of Mississippi, admitted all the allegations of fact in the bill but objected to the jurisdiction of the court on the grounds that sufficient jurisdictional amount [fol. 46] was not involved and that the cause was not cognizable in equity as no rights of property were invaded. The plea to the jurisdiction was overruled and an interlocutory injunction issued on bond. On final hearing the injunction was made permanent.

Statement of Facts

The undisputed material facts are these. Based on the census enumeration of 1910, Mississippi was allotted eight representatives in Congress. Under the provisions of Sec. 22, Act of June 18, 1929, 46 Stat. 26, the allotment was reduced to seven.

The act of the Mississippi Legislature complained of, House Bill No. 197, Regular Session, 1932, divides the state

of Mississippi into seven congressional districts. The number of inhabitants in each district is approximately as follows. The first district, 241,000; second district, 219,000; third district, 420,000; fourth district, 184,000; fifth district, 244,000; sixth district, 284,000; seventh district, 414,000.

According to the 1930 census, Mississippi has 2,009,821 inhabitants. It would be practicable to divide the state into seven districts having compact and contiguous territory with each district having approximately the same number of inhabitants.

Conclusions of Law

The right to vote for a Representative in Congress is [fol. 47] a right guaranteed by the Constitution of the United States. U. S. vs. Mosley, 238 U. S. 383. Said right to vote implies the right to vote in a legal election. Sec. 3 of the Act of August 8, 1911, requires each state to be divided into the number of districts equal to the number of representatives to which the state may be entitled, said districts to be composed of contiguous and compact territory, and to have as nearly as practicable the same number of inhabitants. The act is mandatory and must be followed by the states in fixing Congressional districts. The Mississippi act is clearly violative of the said act of Congress and illegal and void. Any election for representatives based upon the redistricting of the state under the provisions of said act will therefore be illegal and deprive the voters of the state of a right guaranteed by the Constitution. The plaintiff has no remedy at law at all. An injunction is the proper remedy in the premises.

Under the provisions of Sec. 24, subdiv. 14, Judicial Code, (28 U. S. C. A. 41) the District Court has jurisdiction in equity, regardless of the amount involved or the violation of any right of property, to prevent invasion of any right of a citizen guaranteed by the Constitution.

[fol. 48] In United States District Court for the Jackson Division of the Southern District of Mississippi

No. 407

S. C. Broom, Complainant,

v.

Walker Wood, Secretary of State, of the State of Mississippi, et al., Defendants

Before a Specially Constituted Court, under Section 266 of the Judicial Code as Amended, U. S. C. A., Title 28, Section 380, Composed of Foster, Circuit Judge, and Holmes and Dawkins, District Judges

Dissenting Opinion by Judge Holmes—Filed August 24, 1932

The final decree in this case is broad in terms and far-reaching in effect. It expressly declares void an entire act of the Legislature and perpetually enjoins the Governor, as well as all subordinate officers, from executing its provisions. It indirectly strikes at nominations by political parties, although it was stated in open court that no interference with party primaries was asked by the plaintiff; but I shall not dwell upon this seemingly apparent error in the decree, as the objections to it are more deeply rooted. However, see Section 5870 and 5900 Miss. Code of 1930; Newberry vs. United States, 256 U. S. 232.

It was conceded at the hearing, and the court judicially [fol. 49] knows, that the elections sought to be regulated are regular ones provided by law to choose officers, both state and federal, in addition to representatives in Congress, and that the expense of adding the names of congressional candidates to the ballot is too trifling for this or any court to consider. It was further conceded at the bar that the right of the plaintiff to be a candidate for office was not a sufficient legal basis for the issuance of an injunction.

Reliance for jurisdiction in this court is had solely upon Sec. 24, Par. 14, of the Judicial Code. Regardless of the amount in controversy, this paragraph gives the court jurisdiction of "all suits at law or in equity authorized by law to be brought by any person to redress the deprivation,

under color of any law, * * * of any right, privilege, or immunity secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

It is not conceivable that Congress intended by this paragraph to change the well settled rule that a court of equity is concerned only with matters of property and the maintenance of civil rights. The grant of jurisdiction of "suits at law or in equity authorized by law to be brought" signifies an intention to preserve, and not to obliterate, the his- [fol. 50] torical distinctions between law and equity embedded in the federal constitution, and recognized in federal jurisprudence from the national government's birth to the present time. This court has no jurisdiction in matters of a political nature, except when necessary to the protection of rights of property. "Neither the legislative nor executive department," said Chief Justice Chase, "can be restrained in its action by the judicial department, though the acts of both, when performed, are, in proper cases, subject to its cognizance." Mississippi v. Johnson, 4 Wall 475. "The office and jurisdiction of a court of equity," said Mr. Justice Gray, "unless enlarged by express statute, are limited to the protection of rights of property." In re Sawyer, 124 U. S. 200. Mr. Chief Justice Fuller, on circuit, quoting the preceding excerpts and citing other cases, added: "To assume jurisdiction to control the exercise of political powers, or to protect the purely political rights of individuals, would be to invade the domain of the other departments of government or of the courts of common law." Green v. Mills, 69 Fed. 852. See, also, Giles v. Harris, 189 U. S. 475, 47 L. ed. 909; Brumfield v. Brock, 142 So. 745; Pomeroy's Equity Jurisprudence, Vol. 4, (14 ed.) Sec. 1753.

Questions of equitable jurisdiction and procedure aside, the claim in this case is lacking in matter of substantial federal right. The crux of plaintiff's contention is that the [fol. 51] right to vote implies the right to vote in a legal election where his ballot will count for as much, relatively, as the ballot of any other elector, and that Mississippi's recent redistricting act, by inequality in number of inhabitants, lessens the weight of his vote in comparison with the

vote of electors in other congressional districts with fewer inhabitants. No denial of the right to vote or hold office is asserted. No property or civil right is denied or threatened. The federal implied right, which is asserted, is that the vote of every person in the seventh district shall be of equal weight or power with the vote of every elector in other districts.

With deference, it is thought that the conclusion of the court is predicated upon a false major premise. The equal protection clause of the fourteenth amendment is inapplicable. No statutory or constitutional provision gives any elector the right to vote in a district numerically equal in inhabitants to every other congressional district. Mathematical equality is not required. Numerically exact limits are not fixed, either in the constitution or by act of Congress. The widest discretion has been exercised by the legislatures, under the present and previous apportionments, without congressional interference. Under the one of 1930, there are many states with unequal districts, as to the number of inhabitants. The State of Alabama has one [fol. 52] with 250,000 inhabitants, and another with 450,000; California one with 165,000 and another with 350,000; Michigan one with 225,000 and another with 400,000; Ohio one with 168,281, another with 633,678; Pennsylvania one with 125,322, another with 445,109; South Dakota one with 200,000, another with 650,000; Tennessee one with 195,000, another with 380,000. If, as plaintiff claims, he has a federal right to a balancing vote throughout the United States, it is apparent that this Court can grant him no effective relief. For this reason, the Constitution gave plenary powers to regulate the subject to the Legislature of each state and to the Congress.

There is also a wide gulf between the facts alleged and the right asserted. The bill relies upon the number of inhabitants in each district; nothing is said about the number of qualified electors. This is natural because the basis of representation in the Congress is apportioned by the Constitution in accordance with the number of inhabitants in each state. It is well known that in many of the States, including this one, residence is not the sole qualification of an elector. The proportion of electors to inhabitants is a factual relation, depending upon varying conditions, of which a court cannot take judicial knowledge. Notwith-

standing the excessive number of inhabitants, the plaintiff's vote, under his theory, may outweigh the vote of [fol. 53] electors in other districts with fewer inhabitants. It is a non-sequitur, to conclude that the number of qualified electors in each district is in equal proportion to the number of inhabitants. If then the asserted right existed in the abstract, no facts are shown which would give play to the exercise of it.

The objections to the decree are still more serious. To issue an injunction to restrain the holding of an election, or directing the mode in which it should be held, has ever been regarded by constitutional writers as an interference with a free expression of opinion, and an unwarranted obstruction to the freedom of elections, which, if successful, would be fraught with danger to our republican institutions. The mere effort to assume such a power is suggestive of a tendency to render the people and the officers subservient to the courts, in matters of civil polity and endangers our dual form of state and national government, each with its separate and independent departments.

The relief asked should be denied, not that the redistricting act is deemed wise, or that all of the regulations prescribed by Congress have been fairly met, but because, under the distribution of powers in the federal constitution, the judicial department is not the guardian of the rights of the people in respect to the times, places and manner of holding elections for Representatives in the Congress. The Constitution says these things "shall be prescribed in [fol. 54] each state by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators." If a primary object of the act is evinced by the mandate that "the Representatives to Congress shall be elected by districts composed of contiguous and compact territory," each with only one representative, such object should not be wholly defeated because the Legislature may have abused its discretion with reference to a standard which is plainly directory, as shown by the use of the words, "as nearly as practicable." The discretion was not given to the judiciary. A court can only efface the districts, but Congress may alter the boundaries, or regulate more in detail the number of inhabitants, if not retroactively, at least prospectively.

The rule is well settled that, except where the Constitution has imposed limits upon the legislative power, it must be considered as practically absolute. Judge Cooley says:

"The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fails, the people in their sovereign capacity can correct the evil; but courts cannot assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the Constitution. It cannot run a race of opinion upon points of right, reason and expediency with the law-making power. Any legislative act which does not [fol. 55] encroach upon the power apportioned to the other departments, being prima facie valid, must be enforced, unless restrictions upon the legislative authority can be pointed out in the Constitution, and the case shown to come within them."

If it be contended that, as a citizen or an elector of the State, the plaintiff has a federal right to insist upon a compliance by the Legislature with the Congressional reapportionment act, it becomes readily apparent that in either capacity he has sustained no injury which has not been suffered by the people or the electorate at large. If any wrong has been done by the Legislature, it is a public, political wrong, from which no special injury has resulted, or is impendent to the plaintiff, and for which equity will grant no injunctive relief.

In conclusion, I am constrained to dissent, because I regard the issuance of the injunction in this case as an encroachment by the court upon the legislative power of a state, the necessary effect of which is to substitute the judgment of the court for that of the Legislature, in a matter where the Federal constitution has granted an exclusive discretion, primarily to the legislature of each state and ultimately to the Congress of the United States. Operating in this instance directly upon the primary function of the Legislature, if successful, the injunction portends the possibility of a like encroachment upon the ultimate, or a similar, function granted to the Congress by the Constitution of the United States.

[fol. 56] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL WITH SUPERSEDEAS—Filed September 1, 1932

To the Honorable Benjamin N. Cardozo, Justice of the Supreme Court of the United States:

Now come all of the defendants in the above styled and numbered cause, by their attorney Greek L. Rice, Attorney General, and J. A. Lauderdale, Assistant Attorney General, and conceiving themselves aggrieved by the decree made and entered by a special statutory court in the above styled cause on the 16th day of August, 1932, wherein among other things said Court, composed of Honorable Rufus E. Foster, Circuit Judge, Honorable Ben C. Dawkins, District Judge, and Honorable E. R. Holmes, District Judge, under Section 266 of the United States Judicial Code, Section 38, Title 28, United States Code Annotated, granted the plaintiff's application for an injunction in said cause, do hereby petition [fol. 57] your honor for an appeal to the Supreme Court of the United States from said final decree, and especially that decree granting the plaintiff's application for a permanent injunction, all of which reasons are now set forth in the assignment of errors which is filed herewith.

Petitioners further show unto your Honor that said permanent injunction, if permitted to stand, will seriously interfere with and cause irreparable damages and injury to your petitioners, the State of Mississippi, its officers, agents and citizens; that said injunction prohibits the officers and agents of the State of Mississippi from holding an election for members of Congress according to the Reapportionment Act as made by the Legislature of the State of Mississippi in House Bill No. 197, Acts of the Legislature of 1932.

In view of the fact that petitioners and others will sustain irreparable harm, damages and injury by reason of said Court granting plaintiff's application for said permanent injunction in said cause, these petitioners pray that their petition for an appeal may be allowed with supersedeas until the final determination of said cause in the Supreme Court of the United States.

Petitioners further pray that the transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court [fol. 58] of the United States at Washington, D. C.

Petitioners hereby made exhibits to this petition and ask to be taken as a part hereof as if fully set out herein, the following papers, to wit:

Exhibit "A". The original bill filed by plaintiff.

Exhibit "B". Motion to dismiss the original bill filed by petitioners.

Exhibit "C". The decree of the Court granting a preliminary injunction.

Exhibit "D". Answer of petitioners and motion to dissolve the preliminary injunction.

Exhibit "E". Decree of the Court granting a permanent injunction.

Exhibit "F". Certified copy of House Bill No. 197, Acts of the Legislature, 1932.

Petitioners would further show that under the provisions of Section 5870, Code of 1930, the party primaries to nominate candidates for Congress are required to be held on the fourth Tuesday in August, 1932, and the second primary, if any, three weeks thereafter, and that under the laws of the United States the regular election to elect members of Congress is required to be held on Tuesday after the first Monday in November; that it would be impossible to get a decision of the Supreme Court of the United States on the questions involved within time to hold the primaries and the general election after such decision; that on account of said injunction irreparable loss and injury will be sus- [fol. 59] tained by the parties in nominating their candidates and by the people in electing candidates for Congress, and it is therefore necessary that said appeal be granted with supersedeas in order that the primaries and election may be held in accordance with law and at the time fixed by law.

Petitioners would further show unto your honor that the above styled cause is a suit against the State of Mississippi, its officers, agents and employees, and that, therefore, under the law no bond is required for an appeal with supersedeas by the State from said final decree. However, petitioners would show that if your Honor deems it advisable or ex-

pedient that security be furnished before said appeal with supersedeas is granted, then said petitioners will willingly comply with said order of the Court by depositing cash security with the Clerk of the Supreme Court of the United States or the Clerk of the District Court of the United States for the Southern District of Mississippi, or by filing a bond as required by law.

Respectfully submitted this the 18th day of August, 1932.

Greek L. Rice, Attorney General; J. A. Lauderdale, Assistant Attorney General, Attorneys for Petitioners.

(The exhibits to foregoing petition are here omitted, having all been heretofore copied.)

[fol. 60] In Supreme Court of the United States, Chambers of Cardozo, J.

S. C. Broom, Plaintiff,

v.

Walker Wood, as Secretary of State, et al., Defendants

Application for Supersedeas

Order Denying Application for Supersedeas—Filed September 7, 1932

Whether a court of equity may properly grant an injunction upon the facts exhibited in the bill of complaint is a difficult question as to which I do not intimate any opinion in denying this application.

To suspend the injunction pending the appeal would be equivalent, or nearly so, to a reversal of the final decree of the three-judge court, for the date appointed for the general election will in all probability have gone by before the appeal can be decided.

Such a nullification of the decree by the order of a single justice is an exercise of power so extraordinary as to be justified only by a showing of extraordinary hardship.

I am satisfied that the federal statute (U. S. Code, Title 2, Sec. 8) and the statute of Mississippi (Mississippi Code,

Sec. 6380) governing special elections to fill vacancies which have not been filled at the regularly appointed time, supply the machinery whereby the interests of the public will be adequately protected in the event that the decree for an injunction shall hereafter be reversed.

The application for a supersedeas will therefore be denied.

Dated, Sept. 3, 1932.

Benjamin N. Cardozo, Associate Justice of the United States Supreme Court.

[fol. 61] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed September 7, 1932

To the Honorable Rufus E. Foster, Circuit Judge; Ben C. Dawkins and E. R. Holmes, District Judges, composing said Court:

Now come Walker Wood, Secretary of State, Sennett Conner, Governor, Greek L. Rice, Attorney General, the Election Commissioners of Hinds County, and all of the defendants in the above styled and numbered cause, and conceiving themselves aggrieved by the order made and entered by the above named Court in the above entitled cause on the 16th day of August, 1932, wherein among other things said Court, composed of Judge Rufus E. Foster, Circuit Judge, Judge Ben C. Dawkins and Judge E. R. Holmes, District Judges, under Section 266 of the United States Judicial Code and Section 380, Title 28, United States Code Annotated, granted the plaintiff's application for a permanent injunction in said cause, do hereby petition for an appeal to the Supreme Court of [fol. 62] the United States from said final order and decree, and especially that portion of said decree granting the plaintiff's application for a permanent injunction, all of which reasons are set forth in the assignments of error which is filed herewith.

Defendants further show unto the Court that the above entitled cause is a suit against the State of Mississippi and

its officers, agents and employees and that, therefore, under the law no bond is required for the appeal by the defendants from said final order and decree. In view of the fact that defendants will suffer irreparable harm and damages by reason of said Court granting plaintiff's application for said permanent injunction in said cause, these defendants pray that this their petition for an appeal may be allowed without bond.

Defendants further pray that a transcript of the record proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States at Washington, D. C.

This the 7th day of September, 1932.

Greek L. Rice, Attorney General; J. A. Lauderdale, Assistant Attorney General, Attorneys for Defendants.

[fol. 62a] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER GRANTING APPEAL—Filed September 17, 1932

This day this cause came on to be heard on the application of the defendants in the above entitled cause for an appeal to the Supreme Court of the United States from the final decree rendered in this cause by a specially constituted Three-Judge Court granting the plaintiff's application for a permanent injunction on the 16th day of August, 1932, it is hereby ordered, adjudged and decreed that said appeal be and the same is hereby allowed, and it appearing to the satisfaction of the Court that this suit is a suit against the State of Mississippi, its officers, agents and employees, it is hereby further ordered, adjudged and decreed that pending an appeal from said decree in said cause to the Supreme Court of the United States an appeal bond in the sum of $500.00 shall be and is hereby required, said appeal being granted upon bond being given by the Appellants in the sum of $500.00 conditioned according to law.

Ordered, adjudged and decreed this the 17th day of September, 1932.

Rufus E. Foster, Circuit Judge. E. R. Holmes, District Judge.

[fol. 63] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR—Filed September 7, 1932

Now come the defendants in the above styled cause by Greek L. Rice, Attorney General of the State of Mississippi, and J. A. Lauderdale, Assistant Attorney General of the State of Mississippi, and assign the following grounds of error upon which they will rely on their appeal from a decree made by this Court on the 16th day of August, 1932, in the above styled cause:

I

The Court erred in overruling the motion to dismiss the original bill for the following reasons, to wit:

(a) There is no equity on the face of the bill.

(b) A court of equity is without jurisdiction in this case.

(c) Plaintiff is endeavoring to prevent the deprivation of an alleged political right. A court of equity has no jurisdiction in said cause.

(d) Under the facts stated in the original bill plaintiff is not entitled under the law to have his name placed on the ballot as a candidate for Congress from the state at [fol. 64] large.

(e) The decree of the Court is inefficacious.

II

The Court erred in granting the permanent injunction herein for the following reasons:

(a) There is no equity on the face of the bill.

(b) Under the facts stated in the original bill and admitted in the answer the Federal Court in equity is without jurisdiction in this case.

(c) Under the facts stated in the original bill, and admitted in the answer, plaintiff is not entitled to have his name placed on the ballot as a candidate for Congress from the State of Mississippi.

(d) The decree of this Court is inefficacious and of no valid and binding effect.

(e) House Bill No. 197, Acts Regular Session of the Legislature of 1932, does not contravene any provision of the Federal Constitution.

Respectfully submitted.

Greek L. Rice, Attorney General; J. A. Lauderdale, Assistant Attorney General, Attorneys for Defendants.

[fols. 64-a & 64-b] Bond on appeal for $500.00, approved and filed September 22, 1932, omitted in printing.

[fol. 65] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed September 7, 1932

1. Original bill filed by complainants, with exhibits thereto.

2. Order organizing specially constituted Three-Judge Court.

3. Motion to dismiss the original bill.

4. Motion to amend prayer to original bill.

5. Order allowing amendment to prayer of original bill.

6. Order or decree overruling the motion to dismiss original bill and granting temporary injunction.

7. Answer of defendants.

7½. Motion for Perpetual Injunction.

8. Decree of the Court granting permanent injunction.

9. Opinion, statement of fact and conclusions of law by Judge Foster.

10. Dissenting opinion by Judge Holmes.

11. Petition for appeal with supersedeas. (Inasmuch as exhibits are heretofore made a part of the record, do not [fol. 66] copy exhibits to petition).

12. Opinion of Cardozo, Justice of the United States Supreme Court, denying the petition for appeal with supersedeas.

13. Petition for appeal by defendants.

14. Assignments of error by defendants.

15. Order or decree of Honorable Rufus E. Foster, Circuit Judge, Honorable Ben C. Dawkins and Honorable E. R. Holmes, District Judges, granting the appeal.

Greek L. Rice, Attorney General, and J. A. Lauderdale, Assistant Attorney General, Attorneys for Defendants.

[fol. 67] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 68] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON BY THE APPELLANTS FOR A REVERSAL OF THIS CASE AND DESIGNATION TO PRINT ENTIRE RECORD—Filed Oct. 3, 1932

The Court below erred in overruling the motion to dismiss the original bill, in granting a preliminary injunction and in granting the perpetual injunction for the following reasons, to-wit:

I

There is no equity on the face of the bill—

(a) Because plaintiff had a plain, speedy, complete and adequate remedy at law.

(b) Because there is no probability of a multiplicity of suits.

II

A court of equity is without jurisdiction in this cause—

(a) Because the amount in controversy does not exceed $3,000.00.

(b) Because a Federal Court of equity has no jurisdiction to prevent the deprivation of a political right.

[fol. 69] III

Under the facts stated in the bill, plaintiff is not entitled to have his name placed on the ballot as a candidate for Congress from the state at large.

IV

The decree of this court would be inefficacious—

(a) Because the election could be held without the expenditure of public funds.

(b) Because the Governor must approve the sample ballot. No injunction is prayed for against him.

(c) Because an injunction against the election commissioners of Hinds County would not be effective.

(d) Because a decree of the court could not be enforced.

(e) Because Congress is the judge of the election of its own members, and a decree of this court would not be controlling on Congress.

(f) The power to prescribe the time, place and manner of electing members of Congress is by the Constitution of the United States vested in the State Legislature subject to the power of Congress to make or alter such state regulations, and the courts have no jurisdiction or power in reference thereto.

V

House Bill No. 197, Regular Session of the Legislature of 1932, does not contravene any provision of the Constitution of the United States of the laws thereof.

* * * The appellant as its designation of parts of the record to be printed states that the entire record will be necessary to a proper consideration of the case.

Respectfully submitted.

Greek L. Rice, Attorney General; J. A. Lauderdale, Assistant Attorney General, Attorney- for Appellants.

Endorsed on cover: File No. 37,121. S. Mississippi D. C. U. S. Term No. 424. Walker Wood, Secretary of State of the State of Mississippi, et al., appellants, vs. Stewart C. Broom. Filed October 3, 1932. File No. 37,121.

FILE COPY

No. 424

FILED
OCT 3 1932
CHARLES ELMORE CROPLEY
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1932

WALKER WOOD, Secretary of State, Et. Al,
Appellants,

VS.

STEWART C. BROOM, Appellee.

MOTION TO ADVANCE.

GREEK, L. RICE,
Attorney General of Mississippi
J. A. LAUDERDALE,
Assistant Attorney General
of Mississippi,
Attorneys for Appellants.

In The Supreme Court of The United States

WALKER WOOD, ET AL.....APPELLANTS

No..... VS.

S. C. BROOM .....APPELLEE

MOTION TO ADVANCE.

Now come the appellants, by their attorneys, and move the court to advance the above cause and set it for hearing at some early date so that same may be heard and determined prior to the general election for members of Congress to be held in the State of Mississippi on the 8th day of November, 1932.

The statement of the case, finding of facts and conclusion of law made by the courts below are hereto attached and made a part hereof.

For grounds of said motion, appellants assign the following:

FIRST: Appellants contend that Chapter 197 of the Laws of 1932 does not contravene any provision of the Constitution of the United States and that members of Congress from said state should be elected by districts; that the election of members of Congress from the state-at-large will be null and void; that unless the injunction granted by the court below is dissolved and members of

Congress elected from districts, it will be necessary to hold special elections in the State of Mississippi for the election of Congressmen; that said special election will cost the said state in excess of $50,000; that two primary elections may be held and that each of them will cost in excess of $50,000.

That inasmuch as it is necessary to hold a general election on November 8 for the purpose of electing Supreme Court Judges and Highway Commissioners and inasmuch as the candidates for Congress have already been nominated from districts, such candidates may be elected without any additional expense.

SECOND: If the election is held on November 8 from the state-at-large in order to determine who is and who is not entitled to seats in the national Congress, it will be necessary to carry on expensive litigation and/or contests in the House of Representatives, which will entail large unnecessary expense.

THIRD: On account of said illegal election from the state-at-large, the State of Mississippi, in all probability, will be deprived of representation in the House of Representatives until the courts have determined the constitutionality of said statutes or until the contests are determined by Congress, and thereafter until a special election will be called and held, all to the irreparable damage to the best interest of the state.

FOURTH: In the event this cause is advanced, heard and determined prior to the November election, then said

election for members of Congress may be had in said state either from the state-at-large or from districts in accordance with the decree of this court, in which event the state will not be deprived of its representation, it will not be put to the enormous expense of holding a special election, and expensive litigation and contests in Congress will be aovided.

In the event this court finds that said cause cannot be advanced on the docket, heard and determined prior to the November election, the appellants move the court to supersede the injunction granted by the court below until this cause can be heard on its merits by this court, and for grounds of said motion assign the same grounds as are herein assigned in the motion to advance.

Respectfully submitted,

GREEK L. RICE,
Attorney General

J. A. LAUDERDALE,
Assistant Attorney General
Attorneys for Appellants

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

STEWART C. BROOM,
Complainant,
VS. IN EQUITY
WALKER WOOD, SECRETARY OF STATE, ET AL, Defendants. NO. 407

Before FOSTER, Circuit Judge, and HOLMES and DAWKINS, District Judges.

FOSTER, Circuit Judge.

This is a bill brought by Stewart C. Broom, a citizen of the United States, domiciled in Mississippi, against various state officers, praying for interlocutory and final injunctions to prohibit them from acting under the provisions of House Bill No. 197 of the 1932 Acts of the Legislature of Mississippi, known as the Congressional Redistricting Act, on the ground that it violates the provisions of Art. 1, Sec. 4 of the Constitution of the United States and Sec. 3 of the Act of Congress of August 8, 1911, (Title 2 U. S. C. A. Sec. 3). The defendants, appearing through the Attorney General of Mississippi, admitted all the allegations of fact in the bill but objected to the jurisdiction of the court on the grounds that sufficient jurisdictional amount was not involved and that the cause was not cognizable in equity as no rights of property were invaded. The plea to the jurisdiction was overruled and an interlocutory injunction issued on bond. On final hearing the injunction was made permanent.

STATEMENT OF FACTS.

The undisputed material facts are these. Based on the census enumeration of 1910, Mississippi was allotted eight representatives in Congress. Under the provisions of Sec. 22, Act of June 18, 1929, 46 Stat. 26, the allotment was reduced to seven.

The act of the Mississippi Legislature complained of, House Bill No. 197, Regular Session 1932, divides the state of Mississippi into seven congressional districts. The number of inhabitants in each district is approximately as follows: The first district 241,000; second district, 219,000; third district, 420,000; fourth district, 184,000; fifth district, 244,000; sixth district, 284,000; seventh district, 414,000.

According to the 1930 census, Mississippi has 2,009,-821 inhabitants. It would be practicable to divide the state into seven districts having compact and contiguous territory with each district having approximately the same number of inhabitants.

CONCLUSIONS OF LAW.

The right to vote for a Representative in Congress is a right guaranteed by the Constitution of the United States. *U. S. vs Mosley*, 238 U. S. 383. Said right to vote implies the right to vote in a legal election. Sec. 3 of the Act of August 8, 1911, requires each state to be divided into the number of districts equal to the number of representatives to which the state may be entitled, said districts to be composed of contiguous and compact territory, and to have as

nearly as practicable the same number of inhabitants. The act is mandatory and must be followed by the states in fixing Congressional districts. The Mississippi act is clearly violative of the said act of Congress and illegal and void. Any election for representatives based upon the redistricting of the state under the provisions of said act will therefore be illegal and deprive the voters of the state of a right guaranteed by the Constitution. The plaintiff has no remedy at law at all. An injunction is the proper remedy in the premises.

Under the provisions of Sec. 24, Subdiv. 14, Judicial Code (28 U. S. C. A. 41) the District Court has jurisdiction in equity, regardless of the amount involved or the violation of any right of property, to prevent invasion of any right of a citizen guaranteed by the Constitution.

FILE COPY

No. 424

FILED
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CHARLES ELMORE CR

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1932

WALKER WOOD, Secretary of State, Et. Al,
Appellants,

VS.

STEWART C. BROOM, Appellee.

APPELLANTS' STATEMENT AS TO JURISDICTION ON APPEAL.

GREEK, L. RICE,
Attorney General of Mississippi
J. A. LAUDERDALE,
Assistant Attorney General
of Mississippi,
Attorneys for Appellants.

In The Supreme Court of The United States

OCTOBER TERM 1932

WALKER WOOD, Secretary of State, Et. Al,
Appellants,

VS.

STEWART C. BROOM, Appellee.

APPELLANTS' STATEMENT AS TO JURISDICTION ON APPEAL.

MAY IT PLEASE THE COURT:

The appellants in support of the jurisdiction of this Court to review the above styled cause on appeal, respectfully present:

A.
STATUTORY PROVISION SUSTAINING JURISDICTION.

The act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 936,938, provides that Sections 238 and 266 of the Judicial Code are amended to read as follows:

> "Sec. 238. A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so

provided in the following sections and not otherwise."

"Sec. 266. No interlocutory injunction suspending or restraining the enforcement, operation or execution of any statute of a State by restraining the action of any officer of such state in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such state, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: Provided, however, that one of such three judges shall be a justice of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five day's notice of the hearing has been given to the governor and to the attorney general of the State, and to such other persons as may be defendants in the suit: Provided, that if of opinion that irreparable loss or damage would result

to the complainant unless a temporary restraining order is granted any justice of the Supreme Court or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such state, to enforce such statute or order, accompanied by a stay in such State Court or proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney general of the State, that the suit in the State courts is not being prosecuted with diligence and good faith. The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a

direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

B

DATE OF DECREE AND DATE OF APPLICATION FOR APPEAL

The decree sought to be reviewed was entered on the 16th day of August, 1932.

The application for appeal was presented on the 8th day of September, 1932.

C

NATURE OF CASE AND RULING BELOW

This is an appeal from a final decree of the United States District Court, Southern District of Mississippi, Jackson Division, three judges sitting in the cause wherein appellee filed a bill of complaint against the appellants to enjoin the enforcement of House Bill No. 197, Regular Session of the Legislature of 1932. Prior to the census of 1930 the State of Mississippi was entitled to eight members of Congress. Under the act of Congress reapportioning the representations in the various states the State of Mississippi was allowed only seven Congressmen. Said House Bill No. 197 was an act to redistrict the state so as to provide for seven districts instead of eight. The original bill was filed seeking to enjoin the enforcement of said House Bill No. 197 and requiring that the election for Congressmen in the State of Mississippi be held from the State at large.

The basis for the relief prayed for is the claim that the above act of the Legislature of the State of Mississippi is unconstitutional and void, because:

First: Said act, generally known as the Congressional Redistricting Act, violates the provisions of Article 1, Section 4 of the Constitution of the United States.

Second: Because said act violates Section 3 of the Act of Congress of August 8th, 1911, Title 2, United States Code Annotated, Section 2.

After hearing said cause a majority of said Court, composed of Honorable Rufus E. Foster, Circuit Judge, Honorable E. R. Holmes and Honorable Ben C. Dawkins, District Judges, held that said act was in violation of the Constitution and laws of the United States hereinbefore named, and perpetually enjoined and restrained appellant from holding an election for Congressman under said act.

D

CASES BELIEVED TO SUSTAIN JURISDICTION

The following decisions of this Court are believed to sustain jurisdiction of this appeal:

Moore v. Fidelity & Deposit Co., 272 U. S. 317 320-321;

Smith v. Wilson, 273 U. S. 388;

Ex Parte Buder, 271 U. S. 461, 465;

State Board of Tax Commissioners v. Jackson, 283 U. S. 537;

Rodgers v. Matthews, 76 L. Ed. 271.

We most respectfully submit that this Court has jurisdiction of this appeal by virtue of Sections 238 and 266 of the Judicial Code, as amended by the Act of February 13, 1925.

Respectfully submitted,

GREEK L. RICE,
Attorney General

J. A. LAUDERDALE,
Assistant Attorney General
Attorneys for Appellants

FILE COPY

Office Supreme Court, U. S.
FILED
OCT 11 1932
CHARLES ELMORE CROPLEY
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

NO. 424

WALKER WOOD, SECRETARY OF STATE, ET AL, **Appellants**

VS.

S. C. BROOM, **Appellee.**

BRIEF AND ARGUMENT FOR APPELLANTS.

GREEK L. RICE, Attorney General,

J. A. LAUDERDALE,
Assistant Attorney General,

WILLIAM H. WATKINS,
Attorneys for Appellants.

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In The Supreme Court of The United States

WALKER WOOD, SECRETARY OF STATE, ET AL, **Appellants**

VS.

S. C. BROOM, **Appellee.**

STATEMENT OF THE CASE.

Plaintiff alleges that he is a qualified elector of Hinds County, Mississippi, and that he is qualified under the law and the Constitution of the United States to be a member of the House of Representatives.

The defendants are Walker Wood, Secretary of State, Greek L. Rice, Attorney General, M. S. Conner, Governor, W. W. Downing, Chancery Clerk of Hinds County, Bob Neely, Mrs. H. L. Moorehead and J. W. Vaughan, election commissioners of Hinds County, Mississippi.

Plaintiff brings his suit in his own right and in behalf of the citizens, qualified electors and tax payers of Hinds County, and the State of Mississippi.

Plaintiff further alleges that the Secretary of State is required to furnish to the election commissioners for each of the eighty-two counties of the state a sample official ballot, the form of which shall be followed in printing the ballots for the general election; that the election commission-

ers of Hinds County have practically the same duties in reference to the election in said county.

He further alleges that the Secretary of State is compensated for his services and each of the election commissioners for their services and the managers and clerks and other election officials for their services; that the cost of holding an election in Hinds County is approximately Five Hundred ($500.00) Dollars and in the State of Mississippi Fifty Thousand ($50,000.00) Dollars; that the expense of holding said elections are properly payable out of the general funds of the counties of the state and the expenses of such elections in Hinds County are payable from the general funds of the county; and that the compensation and expenses incurred by the Secretary of State are properly payable out of state funds; that the Chancery Clerk is required under the law to issue warrants payable out of the general fund.

Plaintiff further alleges that under the census of 1930 and under the re-apportionate act of Congress, representatives in Congress from the State of Mississippi were reduced from eight to seven and it became necessary for the State to pass an act redistricting the state; that House Bill 197, Legislature of 1932, a copy of which is made an exhibit to the bill, was enacted by the Legislature.

Appellant further alleges that this statute is in contravention of the Constitution of the United States and of the laws of the United States.

Plaintiff further alleges that the officers herein named as defendants are proposing to hold an election in the

State of Mississippi for the purpose of electing Congressmen from the various districts as set out in said House Bill Number 197 and that said election, if held, would be null and void on account of the unconstitutionality of said act.

Plaintiff then alleges "that a Federal question is involved in this suit and that the Legislative Act involved, redistricting the State of Mississippi, offends and violates Article 1, Section 4, of the Constitution of the United States and the Fourteenth Amendment of the Constitution of the United States and Section 3 of the Act of Congress, approved August 8th, 1911, which is now in full force and effect; and this bill of complaint calls for a construction of the Constitution of the United States and the Acts of Congress as relates to the redistricting of the State of Mississippi, as approved by the Acts of Congress of 1911."

Plaintiff further alleges that he presented a petition signed by fifty qualified electors of the State of Mississippi to the Secretary of State, requesting that his name be placed upon the ballot for the State at large and that his petition was denied. He further alleges that he filed a written request, signed by fifty qualified electors of Hinds County, to the election commissioners of Hinds County, requesting that his name be placed on the ticket used in the general election in Hinds County as a candidate for Congress from the state at large; that this petition was likewise denied.

With reference to equitable jurisdiction, plaintiff alleges: First, that he has no adequate and speedy remedy at law. Second, the multiplicity of suits; third, to prevent

the illegal expenditure of public funds; fourth, to protect the privileges, immunities and rights, guaranteed to this plaintiff and other citizens of the United States.

Plaintiff prays for an injunction, as follows:

First: Against the defendants, enjoining and restraining them from the expenditure of public funds of the State or Hinds County in an election to elect Congressmen from the districts.

Second, that the defendants, Walker Wood, and the election commissioners of Hinds County, be enjoined and required to accept and receive the petition of the plaintiff and to place his name on the sample official ballot to be used in the general election for Congressmen.

MOTION TO DISMISS ORIGINAL BILL.

Defendants, by the Attorney General of the State; have filed a motion to dismiss the original bill and assigns the following grounds, to-wit:

I. There is no equity on the face of the bill.

II. A court of equity is without jurisdiction in this case.

III. Under the facts stated in the original bill, plaintiff is not entitled, under the law, to have his name placed on the ballot as a candidate from the state at large.

IV. The decree of this court would be inefficacious.

I.

THERE IS NO EQUITY ON THE FACE OF THE BILL.

This proposition will be argued under two sub-heads, as follows:

(a) Plaintiff has an adequate remedy at law.

(b) There is no probability of a multiplicity of suits.

At the hearing of the cause on the original bill and motion to dismiss, the Court overruled the motion and granted a preliminary injunction.

Defendants then filed an answer as follows:

"Now come all of the defendants in the above styled cause by Greek L. Rice, Attorney General of the State of Mississippi, and J. A. Lauderdale, Assistant Attorney General, and for answer to the original bill now on file against them say:

I.

"Defendants admit each and every allegation of a material fact which is well pleaded in the original bill on file herein.

"Defendants do not admit the statements and conclusions of law made by plaintiffs in the original bill.

II.

"Defendants aver as follows:

"(1) That there is no equity on the face of the bill.

"(2) That under the facts stated in the bill and admitted in the answer this Court is without jurisdiction in this case.

"(3) That under the facts stated in the original bill and admitted in the answer, plaintiff is not entitled under the law to have his name placed on the ballot as a candidate from the State at large.

"(4) The decree of this Court would be inefficacious.

"(5) House Bill No. 197, Regular Session Legislature 1932, does not contravene any provision of the Federal Constitution.

III.

"Defendants now having answered the allegations of the original bill on file herein pray that said temporary injunction heretofore granted by this Court be dissolved, the original bill be dismissed, and the plaintiff taxed with all costs in this behalf expended."

The cause was then set down for hearing on the original bill and answer on motion for perpetual injunction. The Court granted the perpetual injunction, the decree being as follows, to wit:

"FINAL ORDER

"This cause this day came on for final hearing on Bill of Complaint and answer filed by all of the defendants and by consent of all the parties, the case is set down for final hearing and it appearing to the Court composed of Circuit Judge Rufus E. Foster, and District Judges, E. R.

Holmes and Ben C. Dawkins, heard the cause on August 5, 1932, on motion of the complainant, Stewart C. Broom, for a preliminary injunction herein, according to the prayer and amendment thereto of his bill of complaint herein; and upon defendants' motion to dismiss this suit for causes therein set out, and upon the whole case it appearing that the answer filed by the defendants admits the facts set out in the Bill of Complaint, and the Court having heard the argument of the case, considered the judgment roll herein, and being advised sufficiently:

"IT IS ORDERED, ADJUDGED AND DECREED, a majority of the Court concurring, that the preliminary injunction heretofore granted be and the same is hereby continued and made permanent.

"IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED, a majority of the Court concurring, that the prayer of the Bill and the amendment thereto be and the same is hereby granted, and the defendants, and each of them, are restrained and enjoined from doing and performing any and all of the acts contained in the prayer and the amendment thereto.

"It is further ORDERED, ADJUDGED and DECREED by the Court that Walker Wood, the Secretary of State for the State of Mississippi, be, and he is hereby restrained and enjoined from receiving the returns and certifying the nominees for representatives in Congress from Districts in the State of Mississippi as set out and contained in House Bill 197, known as the Congressional Redistricting Act of the Legislature of the State of Mississippi, and he is restrained and enjoined

from certifying the names of any persons elected representatives in Congress from the State of Mississippi, except those who are elected from the State at large.

"It is further ORDERED, ADJUDGED and

DECREED, that the election commissioners named in the Bill of Complaint of Hinds County, Mississippi, be and they are hereby restrained and enjoined from receiving any sample ballots from the Secretary of State for the State of Mississippi, containing the names of candidates for representatives in Congress by Districts as set out in House Bill 197 of the Acts of Legislature of the State of Mississippi, 1932 Session, known as the Congressional Redistricting Bill for the State of Mississippi, and it is further ordered that said election commissioners be and they are hereby restrained and enjoined from certifying the returns of the election of names of any persons to the Secretary of State of Mississippi for representatives in Congress, except those persons who are elected from the State at large.

"It is further ORDERED, ADJUDGED and DECREED that the Secretary of State of the State of Mississippi be and he is hereby restrained and enjoined from preparing and sending out sample ballots to be used for the election for representatives in Congress for the State of Mississippi, except for an election for representatives in Congress from the State at large.

"It is further ORDERED, ADJUDGED and DECREED that the Secretary of State of the State of Mississippi be and he is hereby restrained and enjoined from certifying to the Governor of the State of Mississippi any persons elected as

representatives in Congress in the State of Mississippi, except those persons elected from the State at large.

"It is further ORDERED, ADJUDGED and DECREED that House Bill 197, known as the Congressional Redistricting Bill for the State of Mississippi at its 1932 session, be and the same is hereby declared unconstitutional and illegal, and that no valid election can be held for representatives in Congress thereunder.

"It is ORDERED, ADJUDGED and DECREED by the Court that the preliminary injunction hereinbefore granted, be and it is now made perpetual, but that no costs be adjudged against the defendants.

"ORDERED and ADJUDGED this the 16th day of August, 1932.

RUFUS E. FOSTER,
U. S. Circuit Judge.
BEN C. DAWKINS,
U. S. District Judge."

It will be interesting to note the variance in the relief prayed for and in the relief granted by the Court.

The finding of facts and conclusions of law as made by the Court are as follows, to-wit:

"This is a bill brought by Stewart C. Broom, a citizen of the United States, domiciled in Mississippi, against various state officers, praying for interlocutory and final injunctions to prohibit them from acting under the provisions of House Bill No. 197 of the 1932 Acts of the Legislature of Mississippi, known as the Congressional Re-

districting Act, on the ground that it violates the provisions of Art. 1, Sec.. 4 of the Constitution of the United States and Sec. 3 of the Act of Congress of August 8, 1911, (Title 2 U. S. C. A. Sec. 3). The defendants, appearing through the Attorney General of Mississippi admitted all the allegations of fact in the bill but objected to the jurisdiction of the court on the grounds that sufficient jurisdictional amount was not involved and that the cause was not cognizable in equity as no rights of property were invaded. The plea to the jurisdiction was overruled and an interlocutory injunction issued on bond. On final hearing the injunction was made permanent.

"STATEMENT OF FACTS.

"The undisputed material facts are these. Based on the cesus enumeration of 1910, Mississippi was allotted eight representatives in Congress. Under the provisions of Section 22, Act of June 18, 1929, 46 Stat. 26, the allotment was reduced to seven.

"The act of the Mississippi Legislature complained of, House Bill No. 197, Regular Session 1932, divides the State of Mississippi into seven congressional districts. The number of inhabitants in each district is approximately as follows: The first district, 241,000; second district, 219,000; third district, 420,000; fourth district, 184,000; fifth district, 244,000; sixth district, 284,000; seventh district, 414,000.

"According to the 1930 census, Mississippi has 2,009,821 inhabitants. It would be practicable to divide the state into seven districts having compact and contiguous territory with each dis-

trict having approximately the same number of inhabitants.

"CONCLUSIONS OF LAW.

"The right to vote for a Representative in Congress is a right guaranteed by the Constitution of the United States. *U. S. vs. Mosley*, 238 U. S. 383. Said right to vote implies the right to vote in a legal election. Sec. 3 of the Act of August 8, 1911, requires each state to be divided into the number of districts equal to the number of representatives to which the state may be entitled, said districts to be composed of contiguous and compact territory, and to have as nearly as practicable the same number of inhabitants. The act is mandatory and must be followed by the states in fixing Congressional districts. The Mississippi act is clearly violative of the said act of Congress and illegal and void. Any election for representatives based upon the redistricting of the state under the provisions of said act will therefore be illegal and deprive the voters of the state of a right guaranteed by the Constitution. The plaintiff has no remedy at law at all. An injunction is the proper remedy in the premises.

"Under the provisions of Sec. 24, Subdivision 14, Judicial Code (28 U. S. C. A. 41) the District Court has jurisdiction in equity, regardless of the amount involved or the violation of any right of property, to prevent invasion of any right of a citizen guaranteed by the Constitution."

The section of the Constitution of the United States in controversy is Article I, Section IV, Clause 1, which reads as follows:

> "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such regulations, except as to the Places of choosing Senators."

The Act of Congress in controversy is the Act of August 8, 1911, Section 5; Section 3 of 37 Stat. 14. Title 2, Section 3, U. S. C. A., is as follows:

> "In each state entitled under this apportionment to more than one Representative, the Representatives to Congress shall be elected by districts composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants. The said districts shall be equal to the number of Representatives to which such State may be entitled in Congress, no district electing more than one Representative. (Aug. 8, 1911, c. 5, Sec. 3, 37 Stat. 14)."

The points raised by the motion to dismiss the bill, the points made by the answer and the points raised by the assignments of error are all the same and are covered by the statement of points to be relied upon for a reversal of this case, and for the sake of brevity will be argued together.

THE STATEMENT OF POINTS TO BE RELIED UPON FOR A REVERSAL OF THIS CASE AS FILED BY APPELLANTS IS AS FOLLOWS:

> "The Court below erred in overruling the motion to dismiss the original bill, in granting a

preliminary injunction and in granting the perpetual injunction for the following reasons, to-wit:

I.

"There is no equity on the face of the bill

"(a) Because plaintiff had a plain, speedy, complete and adequate remedy at law.

"(b) Because there is no probability of a multiplicity of suits.

II.

"A court of equity is without jurisdiction in this cause

"(a) Because the amount in controversy does not exceed $3,000.00.

"(b) Because a Federal Court of equity has no jurisdiction to prevent the deprivation of a political right.

III.

"Under the facts stated in the bill, plaintiff is not entitled to have his name placed on the ballot as a candidate for Congress from the state at large.

IV.

"The decree of this Court would be inefficacious

"(a) Because the election could be held without the expenditure of public funds.

"(b) Because the Governor must approve

the sample ballot. No injunction is prayed for against him.

"(c) Because an injunction against the election commissioners of Hinds County would not be effective.

"(d) Because a decree of the Court could not be enforced.

"(e) Because Congress is the judge of the election of its own members, and a decree of this Court would not be controlling on Congress.

"(f) The power to prescribe the time, place and manner of electing members of Congress is by the Constitution of the United States vested in the State Legislature subject to the power of Congress to make or alter such state regulations, and the courts have no jurisdiction or power in reference thereto.

V.

"House Bill No. 197, Regular Session of the Legislature of 1932 does not contravene any provision of the Constitution of the United States or the laws thereof."

I (a)

ADEQUATE REMEDY AT LAW.

In 1924 the primary election laws of the State of Texas denied the right to vote to negroes. One Nixon, a negro, presented himself at a primary election, held in Texas on July 26th, 1924, and demanded the right to vote. This right was denied to him by the managers of the election. Nixon sued in the District Court of the United States and

from an adverse judgment obtained a writ of error, carrying said cause to the Supreme Court of the United States. In the case of *Nixon v. Herndon*, 273 U. S. 536, 71 L. Ed. 759, the Supreme Court of the United States held as follows:

> "The objection that the subject matter of the suit is political is a little more than a play upon words. Of course, the petition concerns political action, but it alleges and seeks to recover for private damage. That private damage may be caused by such political action, and may be recovered for in a suit at law hardly has been doubted for over two hundred years, since *Ashby v. White;* 2 Ld. Raym. 938, 92 Eng. Reprint, 126, 1 Eng. Rul. Cas. 521, 3 Ld. Raym. 320, 92 Eng. Reprint, 710 and has been recognized by this court, *Wiley v. Sinkler*, 179 U. S. 58, 64, 65 L. Ed. 84, 88, 89, 21 Sup. Ct. Rep. 17; *Giles v. Harris*, 189 U. S. 475, 485, 47 L. ed. 909, 911, 23 Sup. Ct. Rep. 639. See also Judicial Code, par. 24 (11), (12), (14). Act of March 3, 1911, chap. 231, 36 Stat. at L. 1087, 1092. Comp. Stat. par. 991, 4 Fed. Stat. Anno. 2nd ed. p. 840. If the defendants' conduct was a wrong to the plaintiff the same reasons that allow a recovery for denying the plaintiff a vote at a final election allow it for denying a vote at the primary election that may determine the final result."

While the question of the right to sue was not directly raised in the case of *Nixon vs. Condon*, 76 L. ed., advance Sheet No. 12, page 629, not yet officially reported, the Supreme Court of the United States in that case held that where a person was illegally denied the right to vote he had the right to sue the election officers for damages. This affords such person an adequate remedy at law.

Giles vs. Harris, 189 U. S. 475, 47 L. ed. 909: The facts in this case are stated by Justice Holmes, who rendered an opinion, as follows:

> "This is a bill in equity, brought by a colored man on behalf of himself and on behalf of more than five thousand negroes, citizens of the county of Montgomery, Alabama, similarly situated and circumstanced as himself against the board of registrars of that county. The prayer of the bill is in substance that the defendants may be required to enroll upon the voting list the name of the plaintiff and of all other qualified members of his race who applied for registration before August 1st, 1902, and were refused, and that certain sections of the Constitution of Alabama, viz.: 180, 181, 183, 184, 185, 186, 187 and 188 of Article 8, may be declared contrary to the 14th and 15th Amendments to the Constitution of the United States, and void.
>
> "The allegations of the bill may be summed up as follows: The plaintiff is subject to none of the disqualifications set forth in the Constitution of Alabama and is entitled to vote, entitled, as the bill plainly means, under the Constitution as it is. He applied in March, 1902, for registration as a voter, and was refused arbitrarily on the ground of his color, together with large numbers of other duly qualified negroes, while all white men were registered. The same thing was done all over the state. Under section 187, of article 8, of the Alabama Constitution, persons registered before January 1st, 1903, remain electors for life, unless they become disqualified by certain crimes, etc., while after that date severer tests come into play which would exclude, perhaps a large part of the

black race. Therefore, by the refusal the plaintiff and the other negroes excluded were deprived, not only of their vote at an election, which has taken place since the bill was filed, but of the permanent advantage incident to registration before 1903. The white men generally are registered for good under the easy test, and the black men are likely to be kept out in the future as in the past. This refusal to register the blacks was part of a general scheme to disfranchise them, to which the defendants and the state itself, according to the bill, were parties. The defendants accepted their office for the purpose of carrying out the scheme. The part taken by the state, that is by the white population which framed the Constitution, consisted in shaping that instrument so as to give opportunity and effect to the wholesale fraud which has been practiced. * * * * *

"Perhaps it should be added to the foregoing statement that the bill was filed in September, 1902, and alleged the plaintiff's desire to vote at an election coming off in November. This election has gone by, so that it is impossible to give specific relief with regard to that. But we are not prepared to dismiss the appeal or the bill on that ground, because to be enabled to cast a vote in that election is not, as in *Mills vs. Green*, 159 U. S. 651, 657, 40 L ed. 293, 295 16 Sup. Ct. Rep. 132, the whole object of the bill. It is not even the principal object of the relief sought by the plaintiff. The principal object of that is to obtain the permanent advantages of registration as of a date before 1903. * * * * We assume further, for the purpose of decision, that section 1979 extends to a deprivation of rights under color of a state constitution, although it might be argued with

some force that the enumeration of 'statute, ordinance, regulation, custom, or usage' purposely is confined to inferior sources of law. On these assumptions we are not prepared to say that an action at law could not be maintained on the facts alleged in the bill. Therefore, we are not prepared to say that the decree should be affirmed on the ground that the subject matter is wholly beyond the jurisdiction of the circuit court. *Smith v. McKay*, 161 U. S. 355, 358, 359, 40 L. ed. 731, 732, 16 Sup. Ct. Rep. 490. * * * *

"It seems to us impossible to grant the equitable relief which is asked. *It will be observed, in the first place, that the language of Sec.* 1979 *does not extend the sphere of equitable jurisdiction in respect of what shall be held an appropriate subject matter for that kind of relief. The words are, 'shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress'. They allow a suit in equity only when that is the proper proceeding for redress, and they refer to existing standards to determine what is a proper proceeding. The traditional limits of proceedings in equity have not embraced a remedy for political wrongs. Green v. Mills,* 30 *L. R. A.* 90, 16 *C. C. A.* 516, 25 *U. S. App.* 383, 69 *Fed.* 852. But we cannot forget that we are dealing with a new and extraordinary situation, and we are unwilling to stop short of the final considerations which seem to us to dispose of the case. The difficulties which we cannot overcome are two, and the first is this: The plaintiff alleges that the whole registration scheme of the Alabama Constitution is a fraud upon the Constitution of the United States, and asks us to declare it void. But, of course, he could not

maintain a bill for a mere declaration in the air. He does not try to do so, but askes to be registered as a party qualified under the void instrument. If, then, we accept the conclusion, which it is the chief purpose of the bill to maintain, how can we make the court a party to the unlawful scheme by accepting it and adding another voter to its fraudulent lists. If a white man came here on the same general allegations, admitting his sympathy with the plan, but alleging some special prejudice that had kept him off the list, we hardly should think it necessary to meet him with a reasoned answer. But the relief cannot be varied, because we think that in the future the particular plaintiff is likely to try to overthrow the scheme. If we accept the plaintiff's allegations for the purpose of his case, he cannot complain. It is impossible simply to shut our eyes, put the plaintiff on the lists, be they honest or fraudulent, and leave the determination of the fundamental question to the future. If we have an opinion that the bill is right on its face, or if we are undecided, we are not at liberty to assume it to be wrong for the purpose of decision. It seems to us that unless we are prepared to say that it is wrong, that all its principal allegations are immaterial, and that the registration plan of the Alabama Constitution is valid, we cannot order the plaintiff's name to be registered. It is not an answer to say that if all the blacks who are qualified according to the letter of the instrument were registered, the fraud would be cured. In the first place, there is no probability that any way now is open by which more than a few could be registered, but, if all could be, the difficulty would not be overcome. If the sections of the Constitution concerning registration were illegal in their inception, it would

be a new doctrine in constitutional law that the original invalidity could be cured by an administration which defeated their intent. We express no opinion as to the alleged fact of their unconstitutionality beyond saying that we are not willing to assume that they are valid, in the face of the allegations and main object of the bill, for the purpose of granting the relief which it was necessary to pray in order that that object could be secured.

"The other difficulty is of a different sort, and strikingly reinforces the argument that equity cannot undertake now, any more than it has in the past, to enforce political rights, and also the suggestion that state constitutions were not left unmentioned in Sec. 1979 by accident. In determining whether a court of equity can take jurisdiction, one of the first questions is what it can do to enforce any order that it may make. This is alleged to be the conspiracy of a state, although the state is not and could not be made a party to the bill. *Hans v. Louisiana*, 134 U. S. 1, 33 L. ed. 842, 1 Sup. Ct. Rep. 504. The circuit court has no constitutional power to control its action by any direct means. And if we leave the state out of consideration, the court has as little practical power to deal with the people of the state in a body. The bill imports that the great mass of the white population intends to keep the blacks from voting. To meet such an intent something more than ordering the plaintiff's name to be inscribed upon the lists of 1902 will be needed. If the conspiracy and the intent exist, a name on a piece of paper will not defeat them. Unless we are prepared to supervise the voting in that state by officers of the court, it seems to us that all that the

plaintiff could get from equity would be an empty form. Apart from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a state and the state itself, must be given by them, or by the legislative and political department of the government of the United States."

Wiley v. Sinkler, 179 U. S. 58, 45 L. ed. 84, the court stated the facts and held as follows:

"This action is brought against election officers to recover damages for their rejection of the plaintiff's vote for a member of the House of Representatives of the United States. The complaint, by alleging that the plaintiff was at the time, under the Constitution and the Laws of the State of South Carolina, and the Constitution and Laws of the United States, a duly qualified elector of the State, shows that the action is brought under the Constitution and laws of the United States.

"The damages are laid at the sum of $2,500.00. What amount of damages the plaintiff shall recover in such an action is peculiarly appropriate for the determination of a jury, and no opinion of the court upon that subject can justify it in holding that the amount in controversy was insufficient to support the jurisdiction of the Circuit Court. *Barry v. Edmunds*, 116 U. S. 550, 29 L. ed. 729, 6 Sup. Ct. Rep. 501; *Scott v. Donald*, 165 U. S. 58, 89, 41 L. ed. 632, 638, 17 Sup. Ct. Rep. 265; *Vance v. W. A. Vandercook Co.*, 170 U. S. 468, 472, 42 L. ed. 1111, 1112, 18 Sup. Ct. Rep. 674; *North American Transp. & Trading Co. v. Morrison*, 178, U. S. 262, 267, 44 L. ed. 1061, 20 Sup. Ct. Rep. 869.

> "The circuit court therefore clearly had jurisdiction of this action and we are brought to the consideration of the other objections presented by the demurrer to the complaint."

Myers v. Anderson, 238 U. S. 367, 59 L. ed. 1349: In this case plaintiff brought suit for damages against election officials for denying the right of suffrage to negro citizens. The court held that the invalidity of the provisions of a statute prescribing qualifications for voters at an election did not relieve the election officers, appointed under that statute, from liability for denying the right to register and vote at such elction to negro citizens, contrary to the United States Constitution, on account of race, color, or previous condition of servitude.

In the case of *Swafford vs. Templeton,* 185 U. S. 487, this Court held that an action to recover damages from State election officers for their asserted wrongful refusal to permit the plaintiff to vote for a member of the House of Representatives at a national election held in the district where he resided is one arising under the Constitution of the United States of which a circuit court of the United States has jurisdiction. Plaintiff brought the action in this case to recover damages because he contended that the election officers had unlawfully denied him the right to vote in an election held for the purpose of electing Representatives in Congress from the State of Tennesse.

It therefore appears clearly from the decisions announced in the Supreme Court in the above cases that where a person is denied the right to vote that his remedy is by an action at law in the Federal Courts.

It may be contended that in this case plaintiff has not yet been denied his political rights and therefore he has the right to enjoin to prevent the deprivation of the right, however, this contention cannot be maintained, because if his rights are denied him, he has an adequate remedy at law.

This question is settled by the decision of the court in *Giles v. Harris*, supra, wherein the court stated that the main purpose of the bill was to secure to the plaintiff the rights of citizenship for the future, but the court held that equity did not have jurisdiction, because the plaintiff had the adequate remedy at law.

I. (b)

MULTIPLICITY OF SUITS.

In the Court below plaintiff did not argue that there was any probability of a multiplicity of suits in this case. Inasmuch as I will not have an opportunity of replying to the brief filed by appellee herein, I submit the following:

Plaintiff alleges "that to permit the defendants to deny to the thousands of inhabitants of the said district the rights and privileges guaranteed to them by the Constitution and the Laws of the United States would result in a multiplicity of law suits."

There is no allegation that any other person has been denied any right or privilege, either political or civil claimed by himself. It is true that plaintiff alleges that this suit is brought in his own behalf and in behalf of all other

citizens and tax payers of the state. This allegation is not sufficient to show that a multiplicity of suits is probable.

In the case of *Giles v. Harris*, supra, it is shown that in that case the plaintiff brought his suit in his own behalf and in behalf of five thousand other negroes who had been denied the same rights that had been denied to him. In that case the court held he had an adequate remedy at law, but in the case at bar, it is not alleged that any other person had been denied any right by any of the defendants named in said bill.

The law is well settled that a mere probability, or a mere possibility of a multiplicity of suits is not sufficient to give a Federal Court equity jurisdiction.

In the case of *Rogers v. Matthews*, 76 L. ed., Advance sheet No. 7, Page 271, the court held as follows:

> "Appellees' bill of complaint does not state a case within the jurisdiction of equity to avoid multiplicity of suits. As to each appellee a single suit at law brought to recover the tax will determine its constitutionality and no facts are alleged showing that more than one suit will be necessary for that purpose. See *Boise Artesian Hot and Cold Water Co. v. Boise City*, 213 U. S. 276, 285, 286, 53 L. ed. 796, 799, 800, 29 S. Ct. 426; *Dalton Adding Mach. Co. v. State Corp. Commission*, 236 U. S. 689, 700, 701, 59 L. ed. 797, 798, 35 S. Ct. 480.
>
> "But it is said that since each appellee must pay the tax to avoid penalties and criminal

prosecution, all must maintain suits for the recovery of the tax unconstitutionally exacted in order to protect their Federal rights, and that to avoid the necessity of the many suits, equity may draw to itself the determination of the issue necessarily involved in all the suits at law.

"In general, the jurisdiction of equity to avoid multiplicity of suits at law is restricted to cases where there would otherwise be some necessity for the maintenance of numerous suits between the same parties involving the same issues of law or fact. It does not extend to cases where there are numerous parties plaintiff or defendant, and the issues between them and the adverse party are not necessarily identical. *St. Louis, I. M. & S. R. Co. v. McKnight* 244 U. S. 368, 375, 61 L. ed. 1200, 1205, 37 S. Ct. 611; *Kelly v. Gill*, 245 U. S. 116, 120, 62 L. ed. 185, 188, 38 S. Ct. 38, 40 Am. Bank Rep. 421; *Francis v. Flinn*, 118 U. S. 385, 30 L. ed. 165, 6 S. Ct. 1148; *Scott v. Donald*, 165, U. S. 107, 115, 41 L. ed. 648, 654, 17 S. Ct. 262; *Hale v. Allison*, 188 U. S. 56, 77 et. seq., 47 L. ed. 380, 392, 23 S. Ct. 244; and see Pomeroy, Eq. Jur. 4th ed. 1918, Sec. 251, 251½, 255, 259, 268."

The case of *Boise Artesian Hot and Cold Water Company v. Boise City*, 213 U. S. 276, was a suit to enjoin the collection of a privilege tax in the sum of $300.00, to be paid the first day of each and every month and the bill also alleged that the municipal authorities were threatening to tear up or destroy the pipes of the company in the streets of the municipality. The Court held as follows:

"The only suggestions of this kind which the bill presents are that the enforcement of the ordinance will lead to irreparable injury, to multi-

plicity of suits, and cast a cloud upon the company's title to its franchise.

"But there is nothing in the bill which leads us to suppose that any of these results would be brought about by leaving the company to its defense at law. If the city had taken any steps indicating a purpose to remove the pipes and works of the company from the streets of the city, and to deny it the right to continue its business, there would be clear reason for the interposition of a court of equity, for if that were done illegally or unconstitutionally an injury would be inflicted for which the law could afford no adequate remedy. In such a case it would be the plain duty of a court of equity to arrest the destructive steps until their legality or constitutionality could be determined. Such a course would be for the best interests of both parties. * * * * *

"Nor do we think there is any danger of a multiplicity of suits in the sense that would authorize the issuance of an injunction. One suit only had been brought and that by direction of the city council. It remains pending, and when it reached judgment it will determine finally every question in dispute between the parties. There is no need of any other suit except to prevent the running of the statute of limitations, and nothing to indicate that any will be brought. Where the multiplicity of suits to be feared consists in repetition of suits by the same person against the plaintiff for causes of action arising out of the same fact and legal principles, a court of equity ought not to interfere upon that ground, unless it is clearly necessary to protect the plaintiff from continued and vexatious litigation. Something more is required than the beginning of a single

action with an honest purpose to settle the rights of the parties. 1 Pom. Eq. Jur. 3d. ed., Sec. 254."

In *Dalton Adding Machine Co. v. State Corporation Commission*, 236 U. S. 698, the Court held as follows:

"We agree with the district court in its conclusion and in its grounds. Like it, we leave on one side the merits of appellant's claim of immunity and confine ourselves to deciding that no reason is shown for anticipating the ordinary course of the law. We also leave aside the question of whether the action of the commission is or is not the action of a court protected from interference on the part of the courts of the United States. Rev. Stat. Sec. 720, *Brentis v. Atlantic Coast Line Co.*, 211 U. S. 210, 226, 230, 53 L. ed. 150, 158, 160, 29 Sup. Ct. Rep. 67. The general principle is that it is not for the court to stop officers of this kind from performing their statutory duty for fear that they should perform it wrongly. *First Nat. Bank vs. Allbright*, 208 U. S. 548, 553, 52 L. ed. 614, 616, 23 Sup. Ct. Rep. 349. Especially is this true in the matter of collecting taxes and license fees. *Boise Artesian Hot and Cold Water Co. v. Boise City*, 213 U. S. 276, 53 L. ed. 796, 29 Sup. Ct. Rep. 426. The appellant has an adequate remedy at law in its right to raise the constitutional question if proceedings are taken against it, or it seems, to recover the money if it pays under protest. No special circumstances are shown, that we can notice, to take this case out of the ordinary rule. *Indiana Mfg. Co. v. Koene*, 188 U. S. 681, 690, 47 L. ed. 651, 656, 23 Sup. Ct. Rep. 452."

In the case of *Cave v. Randolph*, 287 Fed. 989, the Federal Court held as follows:

> "Nor does the possibility of the multiplicity of arrests and trials in such cases pending a final decision of the question avail to bring the issue within the jurisdiction of equity."

In the case of *St. Louis, I. M. & S. R. Co. v. McKnight*, 244 U. S. 368, the railroad company sought to enjoin certain shippers and travelers from suing the railroad company on account of a controversy over the rates; that is, the railroad company had charged a rate in excess of that claimed to be due by the shippers and travelers. A great number of these claims were involved. The Court held as follows:

> "The only common issue between the railroad company and the several shippers and travelers (namely whether the rates promulgated by the railroad commission were confiscatory) had been settled by the decision of this court. In no other respect have shippers and travelers a common interest. The claims of each present a separate controversy unconnected with that of any of the others. This is obviously true as to all issues of fact, which will arise in considering their several claims."

In the case of *Francis v. Flinn*, 118. U. S. 389, the plaintiff sought the aid of a court of equity to enjoin the officers and certain citizens of Louisiana from interfering with its piloting business. The Court held as follows:

> "The whole gist of the complaint is that the defendants do not treat the plaintiff as having the

right to use his vessel as a pilot boat, and have publicly so stated, and that some of the parties mentioned have been subjected to suits for their acts in piloting. But if this be so, the plaintiff has a full remedy for his alleged wrongs in the courts of law. They furnish no ground for the interposition of a court of equity. If the plaintiff has a right to pilot vessels with his boat through the pass and is wrongfully interfered with by the defendants, or others, he can prosecute them for this wrong. If his vessel is arrested in its passage, without lawful warrant, he can bring the defendants before the courts to answer for their conduct. If his pilots are duly licensed, and they are hindered or prevented from the exercise of their business, both he and they have the same means of redress which are afforded to every citizen whose rights are invaded and obstructed. If the publications in the newspapers are false and injurious, he can prosecute the publishers for libel. If a court of equity could interfere and use its remedy of injunction in such cases, it would draw to itself the greater part of the litigation properly belonging to courts of law.

"We think the court below should have sustained the demurrer of the defendants for want of equity in the bill."

In *Dows v. Chicago*, 78 U. S. 112, a bill for injunction was filed by Dows, the owner of stock in the Union National Bank, in which the validity of tax on national bank stock was questioned. Of course, there were not only a number of stockholders in this particular bank interested, but also all stockholders in the national banks of the state of Illinois were interested in said suit. However, the court held that

the Federal Court did not have jurisdiction to restrain the collection of the tax in this case, the court holding as follows:

> "No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or where the property is real estate, throw a cloud upon the title of the complainant, before the aid of a court of equity can be invoked."

This is an old case and one of the leading cases on the subject, and has been followed and cited in almost every case of importance involving the jurisdiction of a court of equity since said time.

II.

A court of equity is without jurisdiction in this case.

This proposition will be argued under the following headings to-wit:

(a). The amount in controversy does not exceed Three Thousand (3,000.00) Dollars.

(b). A court of equity has no jurisdiction under the facts alleged in this bill.

II. (a).

AMOUNT IN CONTROVERSY.

In the event this Court holds that a Federal Equity

Court has jurisdiction of this case under the provisions of sub-section 14, Section 24, Judicial Code, then it is unnecessary for plaintiff to allege or prove that the amount in controversy exceeded the sum of $3,000.00. Plaintiff in the Court below abandoned their right to bring this suit on the ground that they were enjoining the illegal expenditure of public funds. If jurisdiction is had on this ground, then the amount in controversy must exceed $3,000.00.

I have been unable to find any opinion of a Federal Court, holding that a Federal Court did or did not have jurisdiction to enjoin the illegal expenditure of public funds. However, assuming that in proper cases a Federal equity court would have this power, it is clear that under the allegations of this bill, the jurisdictional facts are not sufficiently set out.

The primary purpose of this bill is to secure an order of this court so that he may be a candidate from the state at large. In order to secure jurisdiction for this purpose the plaintiff alleges that to hold an election from the districts would be void and that the expenditure of funds for such purpose would be illegal.

There are a number of federal cases wherein the jurisdiction of the Federal Courts to enjoin the collection of a tax under a statute which is unconstitutional is upheld. This class of cases would be analogous to the case at bar. In all of said cases the court held that the amount in controversy must exceed the sum of Three Thousand ($3,000.00) Dollars and that in estimating this amount, the taxes to be paid for one year by one person could be con-

sidered. In other words, in the case at bar, the plaintiff would have to show that his damage, by reason of the illegal expenditure of public funds for the holding of said election, would exceed $3,000.00. There is no such allegation and no facts alleged from which such allegation might be inferred. The jurisdictional fact is therefore not alleged.

If jurisdiction is had in this case on the ground that the court has the right to enjoin the illegal expenditure of public funds, then this is a property right, and the jurisdiction, if any, must be found in Section 24, Judicial Code, as amended, sub-section 1 (U. S. C. A. title 28, Section 41, sub-section 1).

It is clear that plaintiff is attempting to get jurisdiction by virtue of the provisions of sub-section 14 of said section, but if he is depending on the illegal expenditure of public funds for jurisdiction, then the jurisdiction is fixed in said sub-section 1 and the amount in controversy must exceed the sum of $3,000.00.

In *Fishback v. Western Union Telegraph Co.*, 161 U. S. 96, the telegraph company sought to enjoin the collection of certain taxes. It appears from the reported case that the taxes against the telegraph company were assessed in each county. The court held that the telegraph company could not combine the taxes in the separate counties, and unless the tax in one county was more that the jurisdictional amount, then the suit must fail.

See also *Walter v. Northeastern R. R. Co.*, 147 U. S. 370.

In *Holt v. Indiana Manufcaturing Co.*, 176 U. S. 68, it is held that a suit to restrain the collection of taxes not exceeding $2,000.00 in amount, though arising under the constitution or laws of the United States, is not within the jurisdiction of the Circuit Court of the United States.

This case further holds that future taxes which may be affected by the decision cannot be included in determining the value of the matter in dispute.

In *Citizens Bank of Louisiana v. Cannon*, 164 U. S. 319, the court held that in a suit by a bank to enjoin the collection of taxes for certain years on property claimed to be exempt, the amount of the tax being insufficient to give jurisdiction, the fact that the value of the exemption during the continuance of the charter of the bank will exceed the jurisdictional amount, will not give jurisdiction.

In the case of *Cole v. Norborne Land Drainage District*, 207 U. S. 45, the Supreme Court held that in a suit to enjoin the collection of a tax for drainage benefit on the ground of the unconstitutionality of the statute that the assessments against each of them was less than the jurisdictional amount and the suit could not be sustained.

The tax for the current year and not for future years controls in a case to enjoin the collection of a tax.

See *Citizens Bank v. Cannon*, 164 U. S. 319.

In *Turner v. Jackson Lumber Company*, 218 U. S. 685, the Supreme Court held that the amount in controversy was the amount of taxes in dispute, and that unless this was

more than the jurisdictional amount, the court would not have jurisdiction.

In *Lion Building Company v. Karatz*, 262 U. S. 77, the Supreme Court held that a plaintiff who sued on his own behalf and on behalf of other persons similarly situated, that the amount in controversy was the amount claimed by each plaitiff, and not the aggregate amount.

In *Scott v. Frazier*, 253 U. S. 243, the Supreme Court held:

> "There is no allegation that the loss or injury to any complainant amounts to the sum of $3,000.00. It is well settled that in such cases as this the amount in controversy must equal the jurisdictional amount as to each plaintiff. *Wheless v. St. Louis*, 180 U. S. 379; *Rogers v. Hennepin Co.*, 239 U. S. 62.
>
> "In cases where, although the entire matter in dispute in the suit exceeds in value the jurisdictional limit, nevertheless, if there are several and separate interests in that sum belonging to distinct parties and constituting distinct causes of action, although actually united in one suit and growing out of the same transaction, the jurisdiction of the court cannot be maintained where such separate interests are below the jurisdictional amount.
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> Ex Parte Baltimore, etc. R. Co., 106 U. S. 5;
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> *Adams v. Crittenden*, 106 U. S. 576;
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> *Schewd v. Smith*, 106 U. S. 188;
>
> *Elgin v. Marshall*, 106 U. S. 578;

Ogden v. Armstrong, 168 U. S. 224;

Chamberlain v. Browning, 177 U. S. 605."

I concede that in the event jurisdiction can be had, by virtue of the provisions of sub-section 14, then it is not necessary to allege that the amount in controversy does exceed $3,000.00 however, as hereinbefore stated, when a property right is involved, then the jurisdictional amount must appear. It is clear from the allegation of the bill that a property right is involved when the right to enjoin the expenditure of funds is involved.

II. (b).

A COURT OF EQUITY HAS NO JURISDICTION UNDER THE FACTS ALLEGED IN THIS BILL.

Judicial Code, Section 267, Section 384 U. S. C. A., provides as follows:

> "Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate and complete remedy at law may be had."

In the Federal Courts the distinction between law and equity is maintained, and remedies afforded by law and equity are separately pursued.

Gibson vs. Schouteau, 13 Wall, 92;

Krippendorf vs. Hyde, 110 U. S. 778;

Carter vs. Ruddy, 166 U. S. 493.

"To maintain a suit in equity when a party has a plain and complete remedy at law is to de-

prive defendant of his constitutional right for a trial by a jury."

Hipp vs. Babin, 19 Howard 271;

Parker vs. Winnipiseogee Co., 2 Black 545;

Insurance Co. vs. Bailey, 13 Wall 616;

Oelrichs vs. Spain, 15 Wall 211;

Granchute vs. Winnegar, 15 Wall 355;

Lewis vs. Cox, 23 Wall 466;

Whitehead vs. Shattuck, 138 U. S. 146;

Scott vs. Neely, 140 U. S. 106;

Swan Land & Cattle Co. vs. Frank, 148 U. S. 603;

Cates vs. Allen, 149 U. S. 451;

Ex Parte Young, 209 U. S. 123.

In the case of *Henrietta Mills vs. Rutherford County*, 281 U. S. 121; 74 L. ed. 737, the Court held as follows:

"Section 16 of the Judiciary Act of 1789 (1 Stat. at L. 82, Chap. 20) provided 'that suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law.'

"This explicit prohibition, continued in Section 723 of the Revised Statutes and Section 267 of the Judicial Code (U. S. C. A. title 28, Section 384), has clear application to proceedings to enjoin the collection of taxes upon the ground that they are illegal or unconstitutional. It must appear that the enforcement of the tax would cause irreparable injury or that there are other special circumstances bringing the case under some rec-

ognized head of equity jurisdiction, before the aid of a Federal court can be invoked. The mere fact that the validity of the tax may be tested more conveniently by a bill in equity than by an an action at law does not justify resort to the former."

In the case of *Ex Parte Sawyer*, 124 U. S. 200, 31 L. ed. 402, text page 409, the Court held as follows:

> "The reasons which preclude a court of equity from interfering with the appointment or removal of public officers of the government from which the court derives its authority apply with increased force when the court is a court of the United States and the officers in question are officers of a state. If a person claiming to be such an officer is, by the judgment of a court of the state, either in appellate proceedings or upon a mandamus or quo warranto, denied any right secured to him by the Constitution of the United States, he can obtain relief by a writ of error from this court."

In the case of *McConihay vs. Wright*, 121 U. S. 201, 30 L. ed. 932, the Supreme Court of the United States held as follows:

> "The adequate remedy at law, which is the test of equitable jurisdiction in these courts, is that which existed when the Judiciary Act of 1789 was adopted unless subsequently changed by Act of Congress."

Judicial Act of 1789 is Section 24, Judicial Code, and Section 41, U. S. C. A.

Giles vs. Harris, 189 U. S. 475.

Said sub-section 14 (a) provides that the district courts shall have original jurisdiction "of all suits at law, or in equity authorized by law, to be brought by any person to redress the deprivation under color of any law, statute, ordinance, regulation, custom or usage of any state, of any right, privilege or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States, providing for equal rights of citizens of the United States or of all persons within the jurisdiction of the United States."

This section gives the Federal Courts jurisdiction *"to redress the deprivation"* of rights.

The bill in this case is filed to prevent the deprivation of a right or rights and not to redress the deprivation of a right or rights.

Black's Law Dictionary defines the word "redress" as follows: "Receiving satisfaction for an injury sustained."

Ballentine's Law Dictionary, as follows: "Remedy, Indemnity, Reparation."

Bouvier's Law Dictionary, as follows: "The act of receiving satisfaction."

It is therefore clear that plaintiff is not seeking *"redress"* for the deprivation of a right, but that he is seeking to *prevent* a deprivation of a right.

In the case of *Holt v. Indiana Manufacturing Co.*, 176 U. S., page 68, 44 L. ed., page 374, the Supreme Court of the United States holds as follows:

> "Similar jurisdiction is conferred upon district courts by the 12th clause of Section 563 of the Revised Statutes.
>
> "Section 1979 of the Revised Statutes provides: 'Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof, to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
>
> "All these provisions were brought forward from the act of April 20, 1871, entitled 'An Act To Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes.' 17 Stat. at L. 13, Chap. 22.
>
> "Assuming that they are still in force, it is sufficient to say that they refer to civil rights only, and are inapplicable here."

The statute in question gives the court equity jurisdiction to prevent the deprivation of civil rights. The Court has attempted to prevent the deprivation of political rights. Political and civil rights have been defined by the courts as follows:

POLITICAL RIGHTS DEFINED.

"A 'political right is a right exercisable in the administration of government.' *State ex rel. Attorney General v. Huston*, 113 Pac. 190, 198, 27 Okl. 606, 34 L. R. A. (N. S.) 380; *People ex rel. Attorney General v. Tool*, 86 Pac. 224, 228, 35 Colo. 225, 6 L. R. A. (N. S.) 822, 117 Am. St. Rep. 198 (quoting And. Law Dict. 905.)

"'Political rights' consist in the power to participate directly or indirectly in the establishment or administration of government such as the right of citizenship, suffrage, etc. *Friendly v. Olcott*, 123 Pac. 53, 56, 61 Or. 580.

"'Political rights' consist in the power to participate, directly or indirectly, in the establishment or management of the government. These political rights are fixed by the Constitution. Every citizen has the right of voting for public officers and of being elected. These are the political rights which the humblest citizen possesses. *Winnett v. Adams*, 99 N. W. 681, 684, 71 Neb. 817 (quoting 2 Bouv. Law Dict.)

"The right to become the nominee of a political party for public office, whether national or state, and as such nominee to receive the votes of the qualified electors voting to fill such office, is a purely 'political right' as contradistinguished from a civil or property right. 'Political rights' consist in the power to participate, directly or indirectly, in the establishment or management of the government. These political rights are fixed by the Constitution. Every citizen has the right to vote for public officers, and of being elected. These are the political rights which the humblest citizen possesses. *A court of equity has no juris-*

diction to enjoin officers of a state, acting under a state statute from issuing a certificate of nomination to a candidate for representative in Congress; the right involved being purely political, as distinguished from a civil or property right, to which alone the jurisdiction of equity extends. Anthony v. Burrow, 129 Fed. 783, 784, 789, (quoting and adopting definition in Re Sawyer, 8 Sup. Ct. 482, 124 U. S. 200, 31 L. ed. 402).

"Under Const. Art. 6, Par. 3, which provides that persons convicted of infamous crimes, unless restored to their civil rights, shall be excluded from the elective franchise, an information charging that accused, in registering to vote, falsely swore that he had not lost his civil rights by being convicted of an infamous crime, whereas he had been convicted in another state of the infamous crime of breaking jail before conviction, does not state an offense; the right to vote being 'political' and not 'civil'. *State v. Collins*, 124 Pac. 903, 904, 69 Wash. 268.

"A 'political right' is defined by Anderson to be a right exercisable in the administration of government, and Bouvier says: 'Political rights consist in the power to participate directly or indirectly in the establishment or management of government'. *People v. Barrett*, 67 N. E. 742, 743, 203, Ill. 99, 96 Am. St. Rep. 296.

"Political rights are those which may be exercised in the formation or administration of the government; the term 'rights' as used in this definition, being synonymous with 'power.' *People v. Morgan*, 90 Ill. 558, 563.

"Political rights consist in the power to participate directly or indirectly in the establish

ment or management of government. The elective franchise and the right to hold public office constitute the principal political rights of the citizens of the several states. *People v. Washington*, 36 Cal. 658, 662.

"A political right is a right exercisable in the administration of the government. It is the power to participate directly or indirectly in the establishment or management of the government. Such rights are fixed by the Constitution. A court of equity has no jurisdiction to enjoin issuing notice of an election, and certifying the candidate's thereat, under a law alleged to be unconstitutional since that is a matter involving political and not civil rights. *Fletcher v. Tuttle*, 37 N. E. 683, 686, 151 Ill. 41, 25 L. R. A. 143, 42 Am. St. Rep. 220.

CIVIL RIGHTS DEFINED

"A 'civil right' is a right accorded to every member of a district, community, or nation.' *Winnett v. Adams*, 99 N. W. 681, 684, 71 Neb. 817 (quoting Anderson Law Dict.)

"' Civil rights' are such as belong to any citizen, or, in a wider sense, to every inhabitant of the country, and are not connected with the organization or administration of government, and include the rights of property, marriage, jury trial, etc. *Friendly v. Olcott*, 123 Pac. 53, 56, 61 Or. 580.

"A 'civil right' is said by Anderson to be a right accorded to every member of a distinct community or nation, and Bouvier says: 'Civil rights are those which have no relation to the establishment or management of the government. These

consist in the power to acquire and enjoy property, and of exercising the paternal and marital powers, and the like'. *People v. Barrett*, 67 N. E. 742, 743, 203 Ill. 99, 96 Am. St. Rep. 296.

"A civil right is the right of a citizen; the right of an idividual as an individual; the right due from one citizen to another, the privation of which is a civil injury for which redress may be sought by a civil action. *State of Iowa v. Chicago, B. & Q. R. Co.* (U. S.) 37 Fed. 497, 498, 3 L. R. A. 554 (citing Burr L. Dict. 296).

"By 'civil rights which are protected by the federal Constitution' is meant those rights which the municipal law will enforce, at the instance of private individuals, for the purpose of securing to them the enjoyment of their means of happiness. They are distinguished from 'natural rights,' which would exist if there was no municipal law, some of which are abrogated by municipal law, while others lie outside of its scope, and still others are enforceable under it as 'civil rights.' 'Civil rights' are also distinguishable from 'political rights,' which are directly concerned with the institution and administration of government. 'Civil rights' include the right of every citizen to seek redress of wrongs and the enforcement of rights in the courts, and, as an incident to this, include the right of a party to testify in a criminal case in his own behalf. *State vs. Powers*, 17 Atl. 969, 970, 51 N. J. Law (22 Vroom) 432.

"The term. 'civil rights,' ordinarily 'means all those rights which the laws give a person, which depend upon the laws of the community in which he lives and of which he is a member.' *Bowles v. Habermann*, 95 N. Y. 246, 247.

"As defined by Bouvier, 'civil rights are those which have no relation to the establishment, support or management of government. These consist in the power of acquiring and enjoying property of exercising the parental and marital power, and the like.' They are the absolute rights of persons, the right of personal liberty, and the right to acquire and enjoy property as regulated and protected by law. They are the rights which, according to the fundamental principles of American government, are inalienable. *People v. Washington*, 36 Cal. 658-662.

"A civil right is a right accorded to every member of a district or community, while a political right is a right exercisable in the administration of government. Bouvier in his Law Dictionary says: 'Political rights consist in the power to participate directly or indirectly in the establishment of government or management thereof. These political rights are fixed by the Constitution. Every citizen has the right to vote for public officers and to be elected to office. Civil rights are those which have no relation to the establishment, support, or management of the government. They consist in the power of acquiring and enjoying power to exercise the paternal or marriage relation, or the like.' It will be observed that every one, unless deprived of them by sentence of civil death is in the enjoyment of civil rights, which is not the case of political rights. An alien, for an example, has no political rights, although in full enjoyment of the civil rights.' *Fletcher v. Tuttle*, 37 N. E. 683, 686, 151 Ill. 41, 25 L. R. A. 143, 42 Am. St. Rep. 220.

"Const. Art. 2, Par. 3, which declares that no

person shall be denied any 'civil or political right, privilege or capacity' on account of his religious opinions, means that whatever civil rights, privileges, or capacities belong to or are enjoyed by citizens of the state generally, shall not be taken from or denied any person on account of any religious views that he may entertain. *Hroneck v. People*, 24 N. E. 861, 865, 134 Ill. 139, 8 L. R. A. 837, 23 Am. St. Rep. 652."

A FEDERAL EQUITY COURT HAS NO JURISDICTION TO ENFORCE BY INJUNCTION THE POLITICAL RIGHTS OF A CITIZEN OF THE UNITED STATES.

In the case of ExParte Sawyer, 124 U. S. 200, this Court held as follows:

"Under the Constitution and laws of the United States, the distinction between common law and equity, as existing in England at the time of the separation of the two countries, has been maintained, although both jurisdictions are vested in the same courts. *Fenn v. Holme*, 62 U. S. 21 How. 481, 484-487 (16: 198-200) *Thompson v. Central Ohio R. R. Co.*, 73 U. S. 6 Wall. 134 (18:765); *Heine v. Levee Comrs.*, 86 U. S. 19 Wall. 655 (22:223).

"The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment or the pardon of crimes or misdemeanors, or over the appointment and removal of public officers. To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, or for the removal of public officers, is to

invade the domain of the courts of common law, or of the Executive and Administrative Department of the Government."

In the case of *Cleveland Cliff Iron Company v. Village of Kinney* 262 Fed. Rep., page 980, Text 986, the court held as follows:

"It is the general rule that courts of equity have no jurisdiction in political matters, and that, in the absence of special statutory authority, courts of equity have no power to enjoin the holding of an election; and this is true, whether the election relates to the filling of public office or to other matters, such as changes in boundaries, or political sub-divisions and other kindred matters. *State of Ga. v. Stanton*, 6 Wall 50, 18 L. ed. 721; *Holmes v. Oldham*, 12 Fed. Cas. 421, No. 6,643; *Green v. Mills*, 69 Fed. 852, 16 C. C. A. 516, 30 L. R. A. 90; *Anthony v. Burrow* (C. C.) 129 Fed. 783; *Taylor v. Kercheval* (C. C.) 82 Fed. 497, 500; *Angelus v. Sullivan*, 246 Fed. 54, 64, 158 C. C. A. 280; *Bonifaci v. Thompson* (D. C.) 252 Fed. 878; 879; *People v. City of Galesburg*, 48 Ill. 486, *Dickey v. Reed*, 78 Ill. 261; *Walton v. Develing* 61 Ill. 201; *Fletcher v. Tuttle*, 151 Ill. 41, 37 N. E. 683, 25 L. R. A. 143, 42 Am. St. Rep. 220; *Harris v. Schryock*, 82 Ill. 119; *People v. Barrett*, 203 Ill. 99, 67 N. E. 742, 96 Amer. St. Rep. 296; *People v. McWeeney*, 259 Ill. 161, 102 N. E. 233, Ann. Cas. 1916-B, 34; *Morgan v. County Court*, 53 W. Va. 372, 44 S. E. 182; *Smith v. McCarthy*, 56 Pa. 359 Spelling on Inj. Sec. 630; Joyce on Inj. pars. 1386-1390; *Duggan v. Emporia*, 84 Kas. 429, 114 Pac. 235, Ann. Cas. 1912-A, 719; *City Council of McAlister v. Milwee*, 31 Okla. 620, 122 Pac. 173, 40 L. R. A. (N. S.) 576; McCrary on Elections,

par. 386; Pomeroy's Eq. Rem. vol. 1, sec. 331."

In *Angelus v. Sullivan*, 246 Fed. Rep. 54, the Circuit Court of Appeals, 2nd Circuit, held as follows:

> "But whatever remedy the complainant may have or not have, there can be no doubt that he is not entitled to the relief he asks in his bill of complaint. It has heretofore been laid down by the text-writers and the courts as beyond the scope of the powers of a court of equity to enforce mere personal rights as distinguished from property rights. This, it need not be said, has not been due to the fact that equity regarded rights of property as more sacred than rights of the person. *But the reason for it lies in the fact that equity affords no remedy where there is a full and adequate remedy at law and that the ordinary process of the law courts are fully adequate for the redress of wrongs to the person.*
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> "In Bispham's Equity (8th Ed.) p. 58, the rule is laid down that:
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> " 'Equity is concerned only with questions which affect property, and it exercises no jurisdiction in matters of wrongs to the person as to political rights, or because the act complained of is merely criminal or illegal.'
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> "In Kerr, on Injunctions Ed., pp. 1 and 2, it is said:
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> " 'A court of equity is conversant only with the questions of property and the maintenance of civil rights. Injury to property, whether actual or prospective, is the foundation on which its jurisdiction rests. A court of equity has no jurisdiction in matters merely criminal or merely im-

moral, which do not affect any right to property. If a charge be of a criminal nature, or an offense against the public peace, and does not touch the enjoyment of property, jurisdiction cannot be entertained.'

"In the later editions of this work this statement is omitted because of an act of Parliament which has authorized the courts of that country to grant injunctions in cases where formerly they did not possess the power.

"In 16 Am. and Eng. Encyc. of Law, p. 363, the law is stated as follows:

" 'A court of equity has no criminal jurisdiction and cannot interfere to prevent the commission of criminal or illegal acts unless there is some interference, actual or threatened, with property or rights of a pecuniary nature; but when there is such interference, and there is no adequate remedy at law, the fact that the act may be criminal will not divest the jurisdiction of equity to prevent it.'

"And in the case of In Re: Sawyer, 124 U. S. 200, 210, 8 Sup. Ct. 482, 487 (31 L. ed. 402) (188), the Supreme Court, speaking through Mr. Justice Gray, said that *'the office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property'. To assume jurisdiction in other classes of cases he says would be to 'invade the domain of the courts of common law, or of the executive and administrative department of the government'.*

"Mr. Justice Brewer in the case of In Re: Debs, 158 U. S. 564, 593, 15 Sup. Ct. 900, 910 (39

L. ed. 1092) (1895) speaking for the court and discussing the power of a court of equity to issue an injunction, declared that:

" 'Something more than the threatened commission of an offense against the laws of the land is necessary to call into exercise the injunctive powers of the court. There must be some interferences, actual or threatened, with property or rights of a pecuniary nature; but when such interferences appear the jurisdiction of a court of equity arises, and is not destroyed by the fact that they are accompanied by or are themselves violation of the criminal law.'

"In *Davis & Farnum Mfg. Co. v. Los Angeles*, 189 U. S. 207, 217, 23 Sup. Ct. 498, 47 L. Ed. 778 (1903), Mr. Justice Brown, speaking for the Court as to the jurisdiction of a court of equity, cites approvingly In Re: Sawyer, supra, saying that no further reference is deemed necessary.

"In *Traux v. Raich*, 239 U. S. 33, 37, 33 Sup. Ct. 7, 60 L. ed. 131, L. R. A. 1916 D, 545 Ann. Cas 1917-B, 283 (1915) Mr. Justice Hughes refers to In Re: Sawyer, and declares that while a court of equity generally has no jurisdiction to restrain criminal prosecution under unconstitutional enactments, still it has such jurisdiction 'when the prevention of such prosecutions is essential to the safeguarding of rights of property.'

"In *Green v. Mills*, 69 Fed. 852, 16 C. C. A., 516, 30 L. R. A. 90 (1895), a case in the Circuit Court of Appeals for the Fourth Circuit, Chief Justice Fuller, sitting as a Circuit Judge, and writing the opinion, it was held that a court of equity had no jurisdiction of a bill seeking to enjoin a county supervisor of registration from per-

forming the duties prescribed by the state registration laws, on the ground that such laws were unconstitutional and operated to deprive the plaintiff and others of their right to vote. In the course of his opinion the Chief Justice said:

" 'It is well settled that a court of chancery is conversant only with matters of property and the maintenance of civil rights. The court has no jurisdiction in matters of a political nature, nor to interfere with the duties of any department of government, unless under special circumstances, and when necessary to the protection of rights of property, nor in matters merely criminal, or merely immoral which do not affect any right of property.'

"In *Corliss v. E. W. Walker Co.* (C. C.) 57 Fed. 434, 31 L. R. A.283 (1893), Circuit Judge Colt said:

" 'There is another objection which meets us at the threshold of this case. The subject-matter of the jurisdiction of a court of equity is civil property, and injury to property, whether actual or prospective, is the foundation on which its jurisdiction rests. * * * * It follows from this principle that a court of equity has no power to restrain a libelous publication.'

"In *Taylor v. Kercheval* (C. C.) 82 Fed. 497 (1897) District Judge Baker said:

" 'It is firmly settled that courts of chancery concern themselves only with matters of property and the maintenance of civil rights; such courts have no jurisdiction in matters of an executive or political nature; nor do they interfere with the duties of any department of the government ex-

cept under special circumstances, and then only when necessary to the protection of rights of property; nor can they interfere to restrain criminal or immoral acts unless they affect or threaten to invade rights of property.'

"In *Muhler v. Hedekin,* 119 Ind. 481, 20 N. E. 700 (1889), the court, speaking of a court of chancery, declared that:

" 'The subject-matter of their jurisdiction relates to civil property * * * * actual or threatened, is the foundation of chancery jurisdiction. It is not concerned with matters of political nature * * * * The general principle that equity possesses no power to revise, control or correct the action of public, political, or executive officers or bodies, is, of course, well understood.'

"In *Chappell vs. Stewart,* 82 Md. 223, 33 Atl. 542, 37 L. R. A. 783, 51 Am. St. Rep. 476 (1895), a bill alleged that defendant had employed detectives to watch the plaintiff and thereby caused annoyance and damage to him, and asked for an injunction to restrain the alleged conduct. The injunction was refused by the court below, and the Supreme Court affirmed, and said:

" 'Courts of equity exercise a very extensive jurisdiction in cases involving property rights. * * * In this case it is alleged that rights affecting the complainant's person have been violated, and that there is a purpose to persist in violating them. The ordinary processes of law are fully competent to redress all injuries of this character. They have always been considered beyond the scope of the powers of a court of equity.'

"Numerous other cases have announced the

same doctrine, a few of which are cited: *Fletcher vs. Tuttle*, 151 Ill. 41, 53, 37 N. E. 683, 25 L. R. A. 143, 42 Am. St. Rep. 220 (1894); *City of Chicago vs. Chicago City Ry. Co.*, 222 Ill. 560, 570, 78 N. E. 890 (1906); *Brown vs. Birmingham*, 140 Ala. 590, 596, 37 So. 173 (1903); *Winnett vs. Adams*, 71 Neb. 817, 824, 99 N. W. 681 (1904); *Roberson vs. Rochester Folding Box Co.*, 171 N. Y. 538, 550, 64 N. E. 442, 59 L. R. A. 478, 89 Am. St. Rep. 828 (1902); *Vanderbilt vs. Mitchell*, 72 N. J. Eq. 910, 67 Atl. 97, 14 L. R. A. (N. S.) 304; *Northwestern Law Review*, vol. 3, p. 1."

In *Taylor vs. Kerchevak*, 82 Fed. 497, the Court held as follows:

"But the jurisprudence of the United States has always recognized the distinction between common law and equity, under the constitution, as matter of substance, as well as of form and procedure; and this distinction has been steadily maintained, although both jurisdictions are vested in the same courts. *Fenn v. Holme*, 21 How. 481; *Thompson v. Railroad* Co., 6 Wall, 134; *Cates v. Allen*, 149 U. S. 451; 13 Sup. Ct. 883, 977; *Mississippi Mills v. Cohn*, 150 U. S. 202, 205, 14 Sup. Ct. 75. It is firmly settled that courts of chancery concern themselves only with matters of property and the maintenance of civil rights. Such courts have no jurisdiction in matters of an executive or political nature; nor do they interfere with the duties of any department of the government, except under special circumstances, and then only when necessary to the protection of rights of property; nor can they interfere to restrain criminal or immoral acts, unless they affect or threaten to invade rights of property. In *re Debs*, 158

U. S. 564, 15 Sup. Ct. 900; *Luther v. Borden*, 7 How. 1; *Mississippi v. Johnson*, 4 Wall 475; *State of Georgia v. Stanton*, 6 Wall 50; *in re Sawyer*, 124 U. S. 200, 8 Sup. Ct. 482; *Holmes vs. Oldham*, Fed. Cas. No. 6,643; *Muhler v. Hedekin*, 119 Ind. 481, 20 N. E. 700. 'Neither the legislative nor the executive department,' said Justice Chase, speaking for the Court, in *Mississippi vs. Johnson*, supra, 'can be restrained by the judicial department, though the acts of both, when performed, are, in proper cases, subject to its cognizance.'

"And, Mr. Justice Gray, speaking for the court in re Sawyer, supra, said:

" '*The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property.*'

"And it is clear that the complainant has in no just sense a right of property in his office or employment, for, if he had, congress would be powerless to abolish his office or to impair its tenure. To assume jurisdiction to control the exercise of executive or political powers, or to protect individuals in the enjoyment of purely political rights, would be to invade the domain of other departments of the government, or to intrench upon the jurisdiction of the court of common law.

"In 2 Beach, Mod. Eq. Jur. Sec. 670, it is said:

" 'The jurisdiction to determine the title to a public office belongs exclusively to courts of law, and equity has no jurisdiction over the appointment and removal of public officers, and will not interfere in cases of this character, even in a col-

lateral or indirect proceeding, or in a bill to enjoin.' "

In the case of *Anthony vs. Burrow*, 129 Federal Reports, 783, the court held as follows:

"The first question naturally arising for determination is, does a federal court of equity have jurisdiction to hear and determine a controversy of such nature as that charged in the bill of complaint? The general jurisdiction of this court is invoked, first, on the ground that the controversy involves the jurisdictional amount, and arises under a law of the United States. That law is the Act of Congress of February 7th, 1891, commonly known as the 'Reapportionment Act' which increased the number of representatives in Congress from this state to eight and section 4 of which act provides:

" 'That in case of an increase in the number of representatives which may be given to any state under this apportionment, such additional representative or representatives shall be elected by the state at large, and the other representatives by the districts now prescribed by law until the Legislature of such state in the manner herein prescribed shall redistrict such state, and if there be no increase in the number of representatives from a state the representatives thereof shall be elected from the districts now prescribed by the Legislature of such state.' 26 Stat. 736, c. 116.

"By the provisions of section 2 c. 1, p. 1, Laws 1883, the Legislature of the state had provided that the counties of Atchison, Brown, Doniphan, Nemaha, Jackson, Jefferson, Leavenworth, and Pottawatomie, should constitute the First Con-

gressional District of the state, and such counties did constitute the First Congressional District at the date of the reapportionment act of Congress, above mentioned. While it is not so averred in the complaint, yet it is a well known fact, of which this court takes judicial knowledge, that the Legislature of the state, at its 1897 session, enacted as follows:

" 'That section 2 of chapter 1 of the session laws of 1883, be and the same is hereby amended so as to read as follows: Sec. 2. The counties of Nemaha, Brown, Doniphan, Jackson, Atchinson, Jefferson, Leavenworth, and Shawnee, shall constitute the First District.' Section 1, c. 90, p. 181, Laws 1897.'

"Hence the contention of complainant is that Congress having declared the counties comprising the First Congressional District at the time of the Reapportionment Act should constitute the First Congressional District until the state should, by act of the Legislature, be redistricted in congressional districts, and as the taking of Pottawatomie county out of the first district and placing Shawnee county therein, was not a redistricting of the state, Shawnee County constituted no lawful part of the First Congressional District at at the date of the Holton convention, and the delegates therefrom were not entitled to a voice in such convention.

"Does such contention raise a federal question cognizable in this court sitting in equity? By the repeated adjudications of the Supreme Court it is conclusively settled that a case arises under the Constitution or laws of the United States, whenever, upon the whole record, there is a con-

troversy involving the construction of either. *Cohens vs. Virginia*, 6 Wheat 264, 5 L. Ed. 257; *Nashville vs. Cooper*, 6 Wall, 247, 18 L. Ed. 851; *Tennessee v. Davis*, 100 U. S. 257, 25 L. ed. 648. In so far, therefore, as general jurisdiction of this court depends, the question is, does the decision of this controversy depend upon a construction of the reapportionment act of Congress mentioned? The power to determine the number of representatives in Congress and to apportion that number among the several states resides in and can be exercised only by the Congress of the United States. In the exercise of that power the reapportionment act from which the above question is made was enacted fixing the number of representatives in Congress, from the State of Kansas at 8, and providing for their election. But the power to divide the territory of a state into congressional districts, for the purpose of selecting members of Congress apportioned to a state, is a power residing in the Legislature of a state, and not in the Congress of the United States; as is recognized by said act of Congress. In the exercise of that power the act of the Legislature of 1897, was passed, taking the county of Pottawatomie from, and adding the county of Shawnee to, the First Congressional District. Hence it is apparent that the right of Shawnee County to participate in the proceedings of the Holton Convention, under the averments of complainant's bill does not depend upon the true construction of the 'reapportionment act' of Congress, but does depend upon the validity of the act of the Legislature of the state placing the county of Shawnee in the First Congressional District; and the validity or invalidity of that act of the Legislature is a question for the determination

of the courts of the state, and does not involve a federal question for determination by this court, unless the further contention made by solicitors for complainant may be sustained.

"Such further contention is that under section 2, art. 1, of the federal Constitution, the electoral machinery of the state, when employed for the purpose of selecting representatives in Congress from a state, become laws of the United States, and are to be construed the same as though enacted by Congress for that purpose. In other words, if the determination of this controversy depends upon the construction of acts of the Legislature of the state of Kansas, employed for the purpose of selecting a candidate for the office of representative in Congress from the First Congressional District of the state, such controversy becomes one cognizable by the federal courts, to the same extent as though the construction of the Federal Constitution or laws was directly involved. In support of this contention, *Ex Parte Yarbrough*, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. Ed. 274; *Wiley v. Sinkler*, 179 U. S. 58, 21 Sup. Ct. 17, 45, L. Ed. 84, and *Swafford vs. Templeton*, 185 U. S. 487, 22 Sup. Ct. 783, 46 L. Ed. 1005, are cited. However, an examination of those cases would show the sole question therein determined was, in the Yarbrough case, the sufficiency of the Federal criminal laws to punish one who unlawfully obstructs a person qualified under state laws from voting for a member of Congress; and, in other cases, that federal courts have jurisdiction of an action at law brought by one qualified under state laws to vote for a member of Congress, who is wrongfully prevented from voting; and this, because section 2 of article one of the federal con-

stitution adopts the qualifications required under state laws to vote for a member of the more numerous branch of the state Legislature as the test of the proper qualifications to vote for a member of Congress. From this it will be seen that the claim made by solicitors for complainant, that the above and kindred cases hold the election machinery employed by the state in the selection of candidates for the office of representatives in Congress, becomes, when so employed, a part of the federal law, and the construction of the same raises a federal question, is claiming too much for such cases.

"As the question at bar is not the right to vote, but the privilege of being voted for, and as this is not an action at common law for damages, but relief is sought by a bill in equity, the question whether this court in equity has jurisdiction to grant the injunction prayed remains. It must be apparent to anyone that the relief sought by complainant under his bill, in so far as it prays an order of this court directing the defendant, Burroe, as Secretary of State, of the State of Kansas, to forthwith certify to the several county clerks of the counties comprising the First Congressional District the name of complainant as the party candidate to be placed on the official ballot, to be voted at the coming November election, is not a proper subject of equity, for such relief can only be afforded in an action of mandamus, which is an action at law, and that a federal court of equity will not grant a mandatory injunction upon a preliminary or interlocutory motion against officers of a state, but, if at all, only upon final hearing, and then only to execute the decree of judgment of the court. *Walkley vs. City of Muscatine*, 6 Wall,

483, 18 L. ed. 930; *Fletcher v. Tuttle* (Ill.), 37 N. E. 683, 25 L. R. A. 143, 42 Am. St. Rep. 220; *McCauley vs. Kellogg, et al.*, 2 *Woods*, 13 Fed. Cas. No. 8,688; *Audenried vs. Philadelphia and Reading R. Co.*, 68 Pa. 370, 8 Am. Rep. 195; *Rogers Locomotive Works v. Erie Railroad Co.*, 20, N. J. Eq. 379.

"As to the temporary restraining order now asked, the argument made by solicitors for complainant is that the concluding portion of section 2703, Gen. St. Kan. 1901, above quoted, recognizes the right to proceed in equity in the state courts to restrain the action of the board of which the defendants are members. Hence such remedy, under repeated decisions of the federal courts, may be available in this court, sitting as a court of equity. *Ex Parte McNeil*, 13 Wall 236, 20 L. Ed. 624; *Doris v. Gray*, 16 Wall, 203, 21 L. Ed. 447; *Cowley v. Northern Paficic Railroad Company*, 159 U. S. 569, 16 Sup. Ct. 127, 40 L. Ed. 263, and many other cases are cited in support of the contention made. While it is true that the rights created and remedies provided by the statute laws of a state may be enforced in the federal courts, either in law or in equity, yet the enforcement of such statutory rights and remedies by the federal first presupposes jurisdiction in the federal courts and while the statute under consideration recognizes the right to obtain relief by injunction in the state courts under certain conditions, yet it creates no such right, and in my judgment no such right exists in this court sitting as a court of equity, and this for the following reasons: The right to become the nominee of a political party for a public office, whether national or state, and as such nominee to receive the votes of the quali-

fied electors voting to fill such office, is a purely political right as contra-distinguished from a civil or property right. In *Re Sawyer*, 124, U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402, Mr. Justice Gray says:

" 'The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property.

" 'Political rights consist in the power to participate, directly or indirectly, in the establishment or management of the government. These political rights are fixed by the Constitution. Every citizen has the right to vote for public officers, and of being elected. These are the political rights which the humblest citizen possesses. Civil rights are those which have no relation to the establishment, support, or management of the government. They consist in the power of acquiring and enjoying property, or exercising the paternal and marital powers, and the lik . It will be observed that everyone, unless deprived of them by the sentence of civil death, is in the enjoyment of civil rights, which is not the case with political rights, for an alien, for example, has no political, although in full enjoyment of the civil, rights.' 2 Bouv. Law Dict. 597.

"Mr. Justice Fuller, sitting as Circuit Judge in *Green v. Mills*, 69 Fed. 857, 16 C. C. A. 522, 30 L. R. A. 90, says:

" 'The jurisprudence of the United States has always recognized the distinction between common law and equity, as, under the Constitution, matter of substance, as well as of form and procedure. And the distinction has been steadily maintained, although both jurisdictions are vested in the same court. *Fenn vs. Holme*, 21 How. 481

(16 L. Ed. 198); *Thompson vs. Railroad Co.*, 6 Wall, 134 (18 L. ed. 765); *Cates v. Allen*, 149 U. S. 451 (13 Sup. Ct. 883, 37 L. Ed. 804); *Mississippi Mills vs. Cohn*, 150 U. S. 202 (14 Sup. Ct. 75, 37 L. Ed. 1052). It is well settled that a court of chancery is conversant only with the matters of property and the maintenance of civil rights. The court has no jurisdiction in matters of political nature, nor to interfere with the duties of any department of government, unless such special circumstances, and when necessary to the protection of the rights of property, nor in matters merely criminal or merely immoral, which do not affect any right of property. In *re Sawyer*, 124 U. S. 200 (8 Sup. Ct. 482, 31 L. Ed. 402); *Luther v. Borden* 7 How. 1 (12 L. ed. 581); *Mississippi vs. Johnson*, 4 Wall 475 (18 L. ed. 437); *Georgia vs. Stanton*, 6 Wall 50 (18 L. ed. 721); *Holmes vs. Oldham*, 1 Hughes, 76 (Fed. Cas. No. 6,643)'

"The precise question here under consideration was ruled by the Supreme Court of Illinois in *Fletcher vs. Tuttle*, 151 Ill. 41, 37 N. E. 683, 25 L. R. A. 143, 42 Am. St. Rep. 220. It is there said:

" 'The question then is whether the assertion and protection of political rights, as judicial power is apportioned in this state between courts of law and courts of chancery, are a proper matter of chancery jurisdiction. We would not be understood as holding that political rights a matter of judicial solitude and protection, and that the appropriate judicial tribunal will not, in proper cases, give them prompt and efficient protection, but we think that they do not come within the proper cognizance of courts of equity. In *Sheridan vs. Colvin*, 78 Ill. 237, this court adopting,

in substance the language of Kerr on Injunctions, said: "It is elementary law that the subject of the jurisdiction of the court of chancery is civil property. The court is conversant only with the questions of property and the maintenance of civil rights. Injury to property, whether actual or prospective, is the foundation on which the jurisdiction rests. The court has no jurisdiction in matters merely criminal or merely immoral, which do not afford any right of property. Nor do matters of a political character come within the jurisdiction of the court of chancery. Nor has the court of chancery jurisdiction to interfere with the public duties of any department of the government, except under special circumstances, and where necessary for the rights of property". *Georgia vs. Stanton*, 6 Wall 50 (18 L. ed. 721); In *re Sawyer*, 124 U. S. 200 (18 Sup. Ct. 482, 31 L. Ed. 402); *Sheridan v. Colvin*, 78 Ill. 237; *Dickey v. Reed*, 78 Ill. 261; *Harris vs. Schryock*, 82 Ill. 119, and other cases, are cited in support of the doctrine announced.'

"Again in that case, it is said:

" 'Other authorities of similar import might be referred to, but the foregoing are amply sufficient to show that wherever the established distinctions between equitable and common-law jurisdiction are observed, as they are in this state, courts of equity have no authority or jurisdiction to interpose for the protection of rights which are merely political, and where no civil or property right is involved. In all such cases the remedy, if there is one, may be sought in a court of law. The extraordinary jurisdiction of courts of chancery cannot, therefore, be invoked to protect the right of a citizen to vote or to be voted for at an

election, or his right to be a candidate for or to be elected to any office; nor can it be invoked for the purpose of restraining the holding of an election, or of directing or controlling the mode in which, or of determining the rules of law in pursuance of which, an election shall be held. These matters involve in themselves no property rights, but pertain solely to the political administration of government. If a public officer, charged with political administration has disobeyed or threatens to disobey the mandate of the law whether in respect to calling or conducting an election or otherwise, the party injured or threatened with injury in his political rights is not without remedy, but his remedy must be sought in a court of law, and not in a court of chancery.'

"In *Hardesty v. Taft*, 23 Md. 513, 87 Am. Dec. 584, it is said:

" 'On this branch of the inquiry it seems to the court very clear that a court of equity cannot be invoked to prevent the performance of political duties like those committed to the officers of registration under the law. The willful, fraudulent, or corrupt refusal of a vote by judges of election, or a like denial of registration by the officer appointed to register votes, which is the same thing, can be adequately compensated for in damages at law. The writ of injunction will not be awarded in doubtful or new cases not coming within the well-established principles of equity. *Boneparte v. Railroad Co.*, Fed. Cas. No. 1, 617.'

"In *People v. Canal Board*, 55 N. Y. 393, it is said:

" 'A court of equity exercises its peculiar jurisdiction over public officers to control their ac-

tions only to prevent a breach of trust affecting public franchises, or some illegal act, under color or claim of right affecting injuriously the property rights of individuals. A court of equity has, as such, no supervisory power or jurisdiction over public officials or public bodies, and only takes cognizance of actions against or concerning them when a case is made coming within one of the acknowledged heads of equity jurisdiction.'

"In *Giles v. Harris*, 189 U. S. 475, 23 Sup. Ct. 639, 47 L. Ed. 909, it is held:

" 'A circuit court of the United States in Alabama has not jurisdiction of an action in equity brought by a colored man, resident in Alabama, on behalf of himself and other negroes, to compel the board of registrars to enroll the names upon the voting lists of the county in which they reside under a Constitution alleged to be contrary to the Constitution of the United States.'

"From an examination of the authorities I am persuaded this court has no jurisdiction to restrain the board of which the defendants are the constituent members created under the statute above quoted from acting, upon the ground that such statute is unconstitutional and void, or upon any ground set forth in the bill. The right sought to be enforced under the allegations of the bill filed in this case being a political right, and not a civil or property right, this court has no jurisdictin to entertain the bill, and a temporary restraining order against the defendants as officers of the state constituting such board, under the law above quoted, may not and should not be granted. There is no equity in the bill, and same will be dismissed."

In the case of *Mountain Timber Company vs. State of Washington*, 243 U. S. 219, 61 L. Ed. 685, the Court held as follows:

> "Two of the constitutional objections may be disposed of briefly. It is urged that the law violates Section 4 of article 4 of the Constitution of the United States guaranteeing to every state in the Union a republican form of government. As has been decided repeatedly, the question whether this guaranty has been violated is not a judicial but a political question, committed to Congress, and not to the courts. *Luther v. Borden* 7 How. 1, 39, 42, 12 L. ed. 581, 597, 599; *Pacific States Teleph. & Teleg. Co. v. Oregon*, 223 U. S. 118, 56 L. ed. 377, 32 Sup. Ct. Rep. 224; *Kiernan v. Portland*, 223 U. S. 151, 56 L. ed. 386, 32 Sup. Ct. Rep. 231; *Marshall v. Dye*, 231 U. S. 250, 256; 58 L. ed. 206, 207, 34 Sup. Ct. Rep. 92; *Ohio ex rel Davis v. Hildebrandt*, 241 U. S. 565, 60 L. ed. 1172, 36 Sup. Ct. Rep. 708."

In the case of *Ohio vs. Hildebrandt*, 231 U. S. 565, 60 L. ed. 1172, the Supreme Court held that whether or not a state has ceased to be republican in form within the meaning of the guaranty of the United States Constitution, Article 4, Section 4, because it has made the referendum a part of the legislative power is not a judicial question but is a political question, which is solely for Congress to determine.

Said sub-section 14 gives the Federal Courts jurisdiction to redress the deprivation of any right secured by the Constitution or any law of the United States "providing for equal rights of citizens of the United States."

Ruling Case Law states the rule as follows:

Ruling Case Law, Vol. 9, Page 987, Section 10:

JURISDICTION OF COURTS IN ELECTION MATTERS GENERALLY:—In considering the general powers of the courts, a distinction has been drawn between the jurisdiction of courts of equity and of law, based upon a distinction between political and civil rights. Political rights have been defined to be rights exercisable in the administration of government and comprehend the power to participate directly or indirectly in the establishment or management of the government. They are opposed to civil rights which broadly comprehend all rights accorded to every member of a district or nation. In view of this distinction, the right of suffrage being political in character, it has been generally held that its assertion and protection are not properly matters for the cognizance of courts of equity, for the subject of the jurisdiction of such courts is civil property, and they are not concerned with the maintenance of purely political rights where no civil or property right is involved. The extraordinary jurisdiction of courts of chancery cannot, therefore, be invoked to protect the right of a citizen to vote or to be voted for at an election, or his right to be a candidate for or to be elected to any office. Nor can it be invoked for the purpose of restraining the holding of an election, or of directing or controlling the mode in which, or of determining the rules of law, in pursuance of which, an election shall be held. If a public officer, charged with political administration, has disobeyed or threatens to disobey the mandate of the law, whether in respect to calling or conducting an election or otherwise, the party injured or threatened with injury in

his political rights, must seek his remedy in a court of law, and not in a court of chancery. 12 *Fletcher vs. Tuttle*, 151 Ill. 41, 37 N. E. 683, 42 A. S. R. 220, 25 L. R. A. 143; *People vs. Barrett*, 203 Ill. 99, 67 N. E. 742, 96 A. S. R. 296; *Shoemaker v. Des Moines*, 129 Ia. 244, 105 N. W. 520, 3 L. R. A. (N. S.) 382 and note; *U. S. Standard Voting Mach. Co. v. Hobson*, 132 Ia. 38, 109 N. W. 458, 119 A. S. R. 539, 10 Ann. Cas. 972, 7 L. R. A. (N. S.) 512; *Duggan vs. Emporia*, 84 Kas. 429, 114 Pac. 235, Ann. Cas. 1912 A719 and note; *Weaver vs. Toney*, 107 Ky. 419, 54 S. W. 732, 50 L. R. A. 105; *Conner vs. Gray*, 88 Miss. 489, 41 So. 186, 9 Ann. Cas. 120 and note; *State v. Aloe*, 152 Mo. 466, 54 S. W. 494, 47 L. R. A. 393; *State vs. Hogan*, 24 Mont. 379, 62 Pac. 493, 51 L. R. A., 958; *City Council of McAllister v. Milwee*, 31 Okla. 620, 122 Pac. 173, 40 L. R. A. (N. S.) 576; *Alderson v. Kanawha County Court Commr's*, 32 W. Va. 640, 9 S. E. 868, 25 A. S. R. 840, 5 L. R. A. 394.

RULING CASE LAW, VOLUME 10, PAGE 342, SECTION 92:

POLITICAL RIGHTS:—Matters of a political character are also outside the pale of a court of equity, no such jurisdiction having ever been conceded to a chancery court, either in a federal or state judiciary, unless it is so provided expressly or impliedly by organic or statute laws. The political rights of a citizen are as sacred as are his rights to a personal liberty or property, but he must go to a court of law for them. A court of equity is a one-man power, wielding the strong force of injunction, often issued at chambers, and on an ex parte hearing. Neither in England nor America has this power been suffered to extend to political affairs. 9

9. *Giles v. Harris,* 189 U. S. 475, 23 S. Ct. 639, 47 U. S. (L. ed.) 909; *Green v. Mills,* 69 Fed. 852, 25 U. S. Apps. 383, 16 C. C A 516, 30 L R A 90; *Walls v Brundidge,* 109 Ark. 250, 160 S. W. 230, Ann. Cas 1915C 980 and note; *Market v. Sumpter County,* 60 Fla. 328, 53 So. 613, Ann. Cas. 1912C 690 and note; *Fletcher v. Tuttle,* 151 Ill. 41, 37 N. E. 683, 42 A. S. R. 220 and note, 25 L. R. A. 143; *Heffran v. Hutchins,* 160 Ill. 550, 43 N. E. 709, 52 A. S. R. 353; *Shoemaker v. Des Moines,* 129 Ia. 244, 105 N. W. 520, 3 L. R. A. (N. S.); *Standard Voting Mach. Co. v. Hobson,* 132 Ia. 38, 109 N. W. 458, 119 A. S. R. 539, 10 Ann. Cas. 972 and note, 7 L. R. A. (N. S.) 512; *Duggan v. Emporia,* 84 Kas. 429, 114 Pac. 235; Ann. Cas. 1912A 719 and note; *Weaver v. Toney,* 107 Ky. 419 54 S. W. 432, 50 L. R. A. 105; *Hardesty v. Taft,* 23 Md. 512, 87 Amer. Dec. 584; *State v. Aloe,* 152 Mo. 466, 54 S. W. 494, 47 L. R. A. 393; *Arnold v. Henry,* 155 Mo. 48, 55 S. W. 1089, 78 A. S. R. 556.

* * * * *

RULING CASE LAW, VOLUME 14, PAGE 375, SECTION 77.

ELECTIONS:—Matters relating to elections, such as the right to vote and the like, are generally regarded as being within the application of the doctrine that equity will not interfere in matters of a political nature. The accepted rule is that the extraordinary jurisdiction of a court of chancery cannot be invoked to protect the right of a citizen to vote, or to be voted for at an election, or his right to be a candidate for, or to be elected to any office, nor can it be invoked to restrain the holding of an election, or of directing or controlling the mode in which, or of determining the

rules of law in pursuance of which an election shall be held. Such matters involve no property rights, but pertain solely to the political administration of government. 9

9. *Green v. Mills*, 69 Fed. 852, 25 U. S. App. 383, 16 C. C. A. 516, 30 L. R. A. 90; *Fletcher v. Tuttle*, 151 Ill. 41, 37 N. E. 683, 42 A. S. R. 220 and note, 25 L. R. A. 143; *United States Stand. Voting Mach. Co. v. Hobson*, 132 Ia. 38, 109 N. W. 458, 119 A. S. R. 539, 10 Ann. Cas. 972, 7 L. R. A. (N. S.) 512.

In this connection, sub-section 15 of said Section 24 of the Judicial Code is very material. This section gives the federal courts jurisdiction "of all suits to recover possession of any office except that of elector of President or Vice-President, any representative in or delegate to Congress, or member of a state legislature, wherein it appears that the sole question touching the title to such office arising out of the denial of the right to vote to any citizen offering to vote on account of race, color or previous condition of servitude."

This provision enlarges the jurisdiction of said courts because under the authorities hereinbefore cited such courts did not have any jurisdiction touching political rights. This section gives such courts the jurisdiction to try the title to said offices when the question of the right to vote is involved. However, members of Congress are especially excepted therefrom and the denial of the right to vote must be on account of race, color or previous condition of servitude.

This section gives the court jurisdiction where certain political rights are involved. To give jurisdiction therein is to exclude jurisdiction in any other matters.

The Congress of the United States certainly did not intend to provide that the federal courts did not have jurisdiction to try the rights of offices, and then allow such courts to govern and control elections for the purpose of electing such officers. If this were a suit to recover possession of office as a member of Congress it is clear under the express provision of said section that this Court would have no jurisdiction. It would, indeed, be a peculiar situation to say that this Court could control the manner of holding an election and then could not determine whether or not the officer had been duly and legally elected. Said section grants to this Court its jurisdiction in reference to political questions. The granting of such jurisdiction excludes any and all other jurisdictions in reference to such matters.

We often hear the expression "inadequate remedy at law." If Federal Courts are allowed to control elections by injunction, then it may well be said that the equitable remedy is inadequate. In the very nature of such cases, they could not or would not be brought until a very short time prior to the date for holding the election. In the event the injunction was illegally denied, plaintiff could not have time to prosecute his appeal and get the cause determined by a Court of final jurisdiction prior to the election. In the event the injunction was improvidently issued, then the defendant could not get his rights determined by a court of final jurisdiction. The case at bar very aptly illustrates this point. Plaintiff was granted a preliminary injunction on August 6th. If defendants had then answered and denied any material allegation in the original bill, the election would have been held before the

case was triable under the rules of practice prevailing in the Federal District Courts. In order to get a trial of the case after a preliminary injunction was issued defendants were compelled to admit all allegations of the bill; then it is only by the good graces of this Court that appellants are able to get their appeal heard and determined prior to the election.

A case of this character in a court of equity could hardly be imagined where the losing party could get the issues determined by a higher court prior to election.

Plaintiff could have waited until a few days before the election when it would have been impossible to get any kind of a hearing except the motion for a preliminary injunction.

My information is that an original bill has been filed in the Federal Court in Tennessee within the last few days, praying that an injunction be granted prohibiting the holding of the elections in that state form districts. Insofar as this election is concerned, the decree of the Court on preliminary injunction will be final.

I, therefore, most respectfully submit that this Court has no jurisdiction to determine the questions involved in this lawsuit.

III.

UNDER THE FACTS STATED IN THE BILL PLAINTIFF IS NOT ENTITLED TO HAVE HIS NAME PLACED ON THE BALLOT AS A CANDIDATE FOR CONGRESS FROM THE STATE AT LARGE.

Section 6176, Code of 1930, creates the State Board of Election Commissioners, which consists of the governor, the secretary of state and the Attorney General.

Section 6177 of said Code provides that "two months before every general election of representatives in Congress, and of elector of president and vice-president of the United States, the State Board of Election Commissioners shall appoint the commissioners of election for each county, who, shall continue in office for two years, unless removed, and until successors are appointed, one of whom shall be designated in his commission to have the official ballot printed and distributed."

Section 6231, Code of 1930, provides as follows:

> "The ballot shall contain the names of all candidates who have been put in nomination, not less than fifteen days previous to the day of election, by the primary election of any political party. There shall be printed on the ballots the names of all candidates so nominated, whether the nomination be otherwise known or not, upon the written request of one or more of the candidates so nominated, or of any qualified elector who will make oath that he was a participant in the primary election, and that the person whose name is presented by him was nominated by such primary election. The commissioner shall also have printed on the ballot the name of any qualified elector who has been requested to be a candidate for any office, by a written petition signed by at least fifteen electors, for any beat or municipal office in a town or village of less than three hundred inhabitants, or fifty qualified electors for any other office, and

when the petition or request has been presented to said commissioner not less than fifteen days before the election; but if any candidate has been so nominated, or has been so requested to become a candidate, less than fifteen days before the election, his name shall not be printed upon the ballot." Section 6234 provides as follows:

"The arrangement of the names of the candidates, and the order in which the titles of the various offices shall be printed, and the size, print, and quality of paper of the official ballot is left to the discretion of the officer charged with printing the official ballot; but the arrangement need not be uniform. It is the duty of the secretary of state, with the approval of the governor, to furnish the designated commissioner of each county a sample of the official ballot, the general form of which shall be followed as nearly as practicable: Provided that in all primary elections the names of the candidates for each office separate shall be arranged alphabetically."

It is clear from these provisions that county election commissioners for each county will be appointed prior to the election to be held in November. The petition to have one's name placed on the ballot is required to be filed fifteen days prior to the general election. Therefore, the duty to make up the ballot for the general election to be held in November will necessarily be performed by the new Board of Election Commissioners. The statute provides that these officers shall be appointed two months prior to the general election, and that the ballot shall be made up fifteen days prior to the election.

The bill alleges that Mr. Broom filed his petition with the election commissioners of Hinds County and that these commissioners declined to accept same. The reason for declining this petition was very probably that said Commission would be out of office and that it was no part of its duty to prepare for the coming election. The new Commission could grant the petition, or if the old commission had disallowed the petition then the new commission could act upon it or another one and give the plaintiff all the rights he is now claiming in this court.

The bill further alleges that it is the duty of the Secretary of State to receive the returns of the primary elections and to determine therefrom who has been nominated. This is not true. These duties are placed upon the State Democratic Executive Committee, and the Secretary of State has absolutely nothing to do therewith. See Section 5895, Code of 1930.

The plaintiff further alleges that he filed a petition with the Secretary of State signed by fifty qualified electors requesting that the Secretary of State place his name upon the sample ballot to be furnished the election commissioners of the county. There is no provision in the law for such a petition. Section 6234 of the Code hereinabove quoted does provide for the Secretary of State, with the approval of the Governor, to make up the sample ballot but there is no provision for the petition set out in the original bill. In order to have his name placed upon the ballot a person must either be nominated by a party primary or he must present to the election commissioner (that is, the county commissioner designated in Section 6177, to

have the official ballot prepared for each county) of each county a petition signed by fifty qualified electors. In other words, a person would not be entitled to have his name placed upon the ticket from the State at large unless he had been nominated by a primary or unless he had filed a petition signed by fifty qualified electors with the election commissioner of each county, then when this information is furnished to the Secretary of State he would be authorized, if the same were approved by the Governor, to place such name on the official ballot.

Said Section 6234 provides that the Secretary of State, "with the approval of the governor," shall furnish the designated commissioners of each county a sample official ballot. There is no allegation in the bill that the Governor approved the petition as filed by said plaintiff.

Even though the election commissioner of Hinds County had received the petition mentioned in plaintiff's bill, and declared it to be his intention to place the name of plaintiff on the official ballot, it would not have availed plaintiff anything for the reason that the election commissioner could not place plaintiff's name on the official ballot unless it had been placed upon the sample ballot furnished by the Secretary of State with the approval of the Governor.

The Secretary of State would not be authorized to place plaintiff's name on the sample ballot unless plaintiff had filed the petition signed by fifty qualified electors with the election commissioner of each county.

The law certainly does not intend to say to one man that in order to get your name on the ticket as party nominee you must make a state-wide campaign and secure the nomination of your party, and to another man, you may get your name on the ticket by simply filing with the Secretary of State a petition signed by fifty qualified electors of the State.

IV.

THE DECREE OF THIS COURT WOULD BE INEFFICACIOUS.

This proposition will be argued under sub-headings as follows:

(a). The election could be held without the expenditure of public money.

(b). The Governor must approve the sample ballot. No injunction is prayed for against him.

(c). An injunction against the election commissioners of Hinds County would not be effective.

(d). The decree of the court could not be enforced.

(e) Congress is the judge of the election of its own members and could annul the decree of this Court.

IV. (a).

THE ELECTION COULD BE HELD WITHOUT THE EXPENDITURE OF PUBLIC MONEY.

Under the laws of the State of Mississippi, the State Highway Commissioners from each of the three districts, and Judges of the Supreme Court from each of the districts are to be elected this year. It, of course, will be necessary to hold primary elections and a general election for the election of said Highway Commissioners and Judges. It will not cost the State of Mississippi anything additional to hold the primaries and the general election to elect members of Congress. The expense of holding such elections will be incurred to elect said Highway Commissioners and Judges even though there is no primary or general election for members of Congess. The expense of such election cannot and will not be increased by placing the names of the candidates for Congress thereon. The printing expense wil be the same; the expense for ink, paper, pens, and other incidentals, will be the same, and no part of the public funds will be saved if this Court enjoins the holding of said election.

Plaintiff does not pray that the election for Congress be enjoined, but merely prays that the Secretary of State and the Chancery Clerk of Hinds County be enjoined from expending public funds in the holding of said election.

Even though the injunction were granted as prayed for, the election could be held without violating the injunction because no public money would be expended on account thereof.

IV. (b).

THE GOVERNOR MUST APPROVE THE SAMPLE BALLOT. NO INJUNCTION IS PRAYED FOR AGAINST HIM.

Under the provisions of Section 6234, Code of 1930, the Secretary of State can only prepare and furnish to the county election commissioners a sample ballot when such ballot is approved by the Governor. The plaintiff in this case does not pray for an injunction to be issued against the Governor. There is no allegation that the Governor approved or disapproved the action of the Secretary of State. Even though this Court were to order the Secretary of State to place plaintiff's name on the ballot, it would be ineffective unless the Governor would approve it. Therefore, plaintiff would obtain no relief by having a mandamus issued against the Secretary of State.

In the case of *State ex rel v. Danaher*, 47 Mont. 570, 133 Pac. 961, Ann. Cases 1915-C, 130, it appeared that Danaher purchased certain state lands at a sale held pursuant to the provisions of the Montana statute and thereby became entitled to a certificate signed by the register and by the Governor, as members of the Board of Land Commissioners. Danaher brought mandamus proceedings against the register to compel him to issue the certificate but the court refused to issue the writ on the ground that it would accomplish no beneficial result since the Governor was not a party to the litigation. The Court said:

> "It will be observed that while this section enjoins upon the register the duty to issue the certificate, it must be signed by the Governor as president of the Board of Land Commissioners. If it does not bear the signature of this officer, it is not complete, nor is it effective for any purpose. In effect, therefore, the duty enjoined by this section is made the joint duty of the register and the governor, as president of the Board of Land

Commissioners. Neither can act effectively without the other. Now it does not appear from the statement of facts, or otherwise from the record, that the certificate has been executed ready for delivery by the register. It is stipulated merely that on August 18, 1911, the relatrix made written demand upon the register for the issuance and delivery of the certificate and that he then and there refused to issue and deliver it. It does not appear that any demand was made upon the governor. The issuance of the writ would have, therefore, not given the relatrix any effective relief, for though the register were compelled to perform the duty enjoined upon him so far as he might, the governor would be under no compulsion to act with him and would be free to refuse to add his signature. Then the relatrix would have gained no substantial relief. The rule is well settled that when the writ will accomplish no beneficial result, it will be denied. The same rule applies where the official act to be performed depends upon the act, approval or co-operation of a third person not a party, even though it is clearly the duty of the defendant to act."

In *People v. Bunne*, 258 Ill. 441, 101 N. E. 560, 45 L. R. A. (N. S.) 500, mandamus proceedings were instituted against the Governor, the Secretary of State, the Auditor, the Treasurer, and the Attorney General, as the canvassing board of the State of Illinois to require them to declare the relators elected to certain offices. The Supreme Court denied the writ on the ground that the Governor had authority to proclaim the election and issue the certificates and that mandamus proceedings could not be maintained against him to compel him to perform these acts.

The Court held, in effect, that the members of the State Canvassing Board could not be compelled to canvass returns and declare the election of relators to public office because the writ would be ineffectual since the governor could not be compelled to issue a proclamation and certificate.

18 Ruling Case Law, Section 66, states the rule as follows:

> "When the operative effect of the action sought to be coerced depends upon the co-operative action of a third person, who is not before the Court, the writ will not ordinarily be granted, as its issuance would ordinarily be nugatory, the court having no power to coerce the co-operation of such third person."

Furthermore, the court has no power to compel the governor by mandamus to perform any duty imposed upon him by law.

Vicksburg & R. Co. v. Lowry, 61 Miss. 102;

18 Ruling Case Law, Sections 121, 122, 123, 124, and 125.

The injunction would, therefore, be inefficacious and should not be granted.

IV. (d).

THE DECREE OF THE COURT COULD NOT BE ENFORCED.

In the case of *Giles v. Harris*, 189 U. S. 475, 47 L. ed.

909, the plaintiff filed his bill alleging that he and five thousand other negroes were denied the right to register as qualified electors in the State of Alabama and prayed for an injunction to require the proper authorities to register them. The Court held as follows:

> "The other difficulty is of a different sort, and strikingly reinforces the argument that equity cannot undertake now, any more than it has in the past, to enforce political rights, and also the suggestion that state constitutions were not left unmentioned in Section 1979 by accident. In determining whether a court of equity can take jurisdiction, one of the first questions is what it can do to enforce any order that it may make. This is alleged to be the conspiracy of a state, although the state is not and could not be made a party to the bill. *Hans v. Louisiana,* 134 U. S. 1, 33 L. ed. 842, 10 Sup. Ct. Rep. 504. The circuit court has no constitutional power to control its action by any direct means. And, if we leave the state out of consideration, the court has as little practical power to deal with the people of the state in a body. The bill imports that the great mass of the white population intends to keep the blacks from voting. To meet such an intent something more than ordering the plaintiff's name to be inscribed upon the lists of 1902 will be needed. If the conspiracy and the intent exist, a name on a piece of paper will not defeat them. Unless we are prepared to supervise the voting in that state by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form. Apart from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a state and the

state itself, must be given by them or by the legislative and political department of the government of the United States."

IV. (e).

CONGRESS IS THE JUDGE OF THE ELECTION OF ITS OWN MEMBERS AND COULD ANNUL THE DECREE OF THIS COURT.

Article I, Section V, Paragraph 1, provides as follows:

> "Each House shall be the judge of the elections, returns and qualifications of its own members."

This provision of the Constitution expressly and emphatically provides that the House of Representatives shall be the Judge of the election of its own members. In the event this Court decides that said House Bill No. 197 is unconstitutional and that the election should be from the State at large, and members of Congress are elected from the State at large, then when they presented themselves to the House of Representatives it would be within the power of said House of Representatives to determine whether or not they had been legally elected. On the other hand, if this Court decrees the members of Congerss should be elected from the various districts, when such persons present themselves to be sworn into office, the House would have the express power to determine whether or not they had been legally elected. In other words, under this provision of the Constitution, it is within the power of the

House, and not within the power of this Court to determine whether or not a person has been legally elected as a member of that body.

THE POWER TO DISTRICT A STATE FOR THE PURPOSE OF ELECTING REPRESENTATIVES IN CONGRESS IS VESTED IN THE LEGISLATURE OF THE STATE AND IN THE CONGRESS AND THE COURTS ARE, THEREFORE, WITHOUT POWER OR JURISDICTION TO DECLARE A STATUTE DISTRICTING A STATE UNCONSTITUTIONAL.

Section IV, of Article I, of the Constitution provides that the manner of holding elections for representatives "shall be prescribed in each state by the Legislature thereof, but the Congess may at any time, by law, make or alter such regulations."

Section III, Title 2, U. S. Code, Annotated, provides that the Legislature may district the state and that such districts must be contiguous, compact and of as nearly equal population as practicable.

It might be admitted that on the face of the statute and on the face of the census of 1930 that "the statute is not a substantial compliance with the provisions of the Act of Congress," but this is a question to be determined by the Legislature and its determination is final until Congress has acted. The Constitution gives the Congress specific authority to make or alter the regulations made by the State. The courts cannot interfere with the statutes en-

acted by the Legislature, nor with the Act of Congress in reference thereto.

If the questin is one for the courts, then the courts must be controlled by the facts as shown by the evidence and the question would arise as to whether the districts were compact.

Plaintiffs contend in the court below that they were not and the court held that they were compact. It might be possible to prove the shape and area of the districts. By an examination of the map in the record it will appear that District No. 1 is several times as long as it is wide. District No. 3 is very narrow at each end, wide in the middle and the length is several times its width. The 6th and 7th districts are both very irregular in their boundaries. The court below held these distircts were compact. Another court might hold the said districts are not compact, and yet, another might hold that one or more of such districts are compact and the others are not. In other words, they would get about as many decisions on this question as there were judges to hear the cause. In case the facts were submitted to juries the decisions would be multiplied by twelve.

The Act of Congress does not fix any time for the redistricting act to be enacted by the State Legislature. In the case of *People, ex rel vs. Voohis*, 222 N. Y., 494, it was held that the laws of New York, 1917, redistricting the state were valid, even though the Legislature redistricted the state in 1911, in pursuance of the Reapportionment Act of 1911.

Suppose the Act of 1917 had been attacked on the ground that the populatin of the districts were unequal. The census of 1910 would not have been evidence of the population in 1917. The court could not have had a census made for the purpose of determining the population and such fact could not have been determined in any other manner. The bill in the case at bar shows and the finding of fact by the court shows what the population of each district in the State of Mississippi was, as shown by the census of 1930. The law in controversy was passed in 1932. The census of 1930 was not proof of what the population was in 1932. If the question raised by this case is a question for judicial determination, then it would be necessary to allege and prove what the population was at the time the statute was enacted.

In the case of *Luther vs. Borden*, 7th How., page 1, the question at issue was whether or not a Constitution adopted by the people of Rhode Island in 1842, or a Constitution adopted in 1843 was the valid Constitution of the State of Rhode Island. This court, in an opinion rendered by Chief Justice Tanney, in discussing as to whether or not the validity of the Constitution in controversy was a question for the legislative department of the government or the courts, held as follows:

> "Besides, if the Circuit Court had entered upon this inquiry, by what rule could it have determined the qualification of voters upon the adoption or rejection of the proposed constitution, unless there was some previous law of the state to guide it? It is the province of a court to expound the law, not to make it. And certainly it is no part of the judicial functions of any court of the

United States to prescribe the qualifications of voters in a State, giving the right to those to whom it is denied by the written and established constitution and laws of the State, or taking it away from those to whom it is given; nor has it the right to determine what political privileges the citizens of a State are entitled to, unless there is an established constitution or law to govern its decision.

"And, if the then existing law of Rhode Island which confined the right of suffrage to freeholders is to govern, and this question is to be tried by that rule, how could the majority have been ascertained by legal evidence such as a court of justice might lawfully receive? The written returns of the moderators and clerks of mere voluntary meetings, verified by affidavit, certainly would not be admissible; nor their opinions or judgment as to the freehold qualifications of the persons who voted. The law requires actual knowledge in the witness of the fact to which he testifies in a court of justice. How, then, could the majority of freeholders have been determined in a judicial proceeding?

"The court had not the power to order a census of the freeholders to be taken; *nor would the census of the United States of* 1840 *be any evidence of the number of freeholders in the State in* 1842. Nor could the court appoint persons to examine and determine whether every person who had voted possessed the freehold qualification which the law then required. In the nature of things, the Circuit Court could not know the name and residence of every citizen, and bring him before the court to be examined. And if this were attempted, where would such an inquiry have ter-

minated? And how long must the people of Rhode Island have waited to learn from this court under what form of government they were living during the year in controversy?"

The population of the various districts is ever changing—some districts lose in population, while others gain. If the constitutionality of a statute is to be determined by the courts, on the facts at the time the case is tried, then a redisricting act might be constitutional at the time it is enacted and unconstitutional two years later when it is attacked in the courts. It might be unconstitutional when enacted and constitutional at the time it is tried in the courts.

A statute must be constitutional or unconstitutional. It cannot be valid one day and invalid the next. If this is not true, the act of 1902, redistricting the State of Mississippi, was certainly unconstitutional in 1930. The population of the State in 1930 was 2,009,821. There were eight districts. The average or ideal district would have had a population of 250,000. One district had only 184,000, another had 420,000.

The population of the districts was not equal at the time the Act was passed and has not been since such time, according to any of the census reports. The population of the State in 1900 was 1,550,000 and the average or ideal district would have had a population of 194,000. One district actually had a population of 162,000 and another 232,000.

If a statute is unconstitutional, it is unconstitutional *ab initio* and not merely after it is so declared by the courts. If the Act of 1932 is invalid, then the Act of 1902 was invalid and the State of Mississippi has not had a legal representative in Congress since 1902 and I dare say the same is true of every other state in the Union.

In June, 1929, Volume XLII of the Harvard Law Review, published an article written by Honorable Zachariah Chafee, Jr., on the subject of "Congressional Reapportionment." Said article is very interesting when read in connection with the questions at issue in this case. I quote therefrom, as follows:

> "No group of persons is more vitally concerned with the problem of Congressional reapportionment than the bar. Laws are inevitably affected by the composition of the law making body Loyal obedience to statutes depends largely upon the widespread conviction that they were justly enacted, and this conviction is seriously weakened by an unfair allotment of representatives, Taxation with under-representation is only somewhat less unacceptable than taxation without representation. In recognition of these principles, every previous reapportionment of the national House of Representatives was made before the close of a second year after a census. Yet Congress has failed to make a new reapportionment based on the census of 1930. The House is still organized according to the census of 1910, so that the recent great shifts of population, notably to California and the centers of the automobile industry, remain disregarded in Congress, and in the Electoral College as well. In many states the situation result-

ing from neglect or unfair discrimination in the demarcation of legislative districts is perhaps even worse. We are permitting the streams of legislation to become poisoned at the source.

"The long failure of Congress to perform its constitutional duty of reapportionment invites attention to three questions: First, the possibility of compelling Congress to act and the legal consequences of its continued inaction; secondly, the validity of the proposed enabling act, establishing a permanent scheme of apportionment to be put in effect by the president or some other high official soon after the census of 1930 and after subsequent enumerations, whenever Congress itself fails to reapportion.

1.

THE LEGAL CONSEQUENCES OF FAILURE TO REAPPORTION.

"The failure of Congress to agree upon a plan for revising the last apportionment of 1911 may possibly continue beyond the census of 1930. May the courts then compel action by Congress, or declare that its inaction renders invalid not only legislation but also presidential elections carried out under the obsolete arrangement of membership in the House and the Electoral College?

"Congress is under a mandatory constitutional duty to reapportion. But the violation of such a duty does not always confer power upon the courts to compel its peformance. Several clauses of the Constitution impose what may be called imperfect obligations. They define the duty but withhold the sanction. Thus, a fugitive from justice in one state is required to be delivered upon demand of

its governor if he is found in another state, but the fulfilment of this obligation is left entirely to the authorities of the second state and cannot be judicially enforced. Again, the United States guarantee to every state a republican form of government, but it is for Congress, not the courts, to decide whether any novel institution in a state is unrepublican. The members of the House of Representatives are to be chosen by the electors qualified to vote for the most numerous branch of the state legislature, but if there be no provision in the state constitution for such a legislature, no Congressmen can be chosen. It seems probable that the duty to reapportion is a similarly imperfect obligation, and that the courts cannot compel a law for that purpose any more than they could compel Congress to impose taxes in order to pay judicial salaries if Congress preferred to leave the treasury empty.

"This position is supported by the recent Illinois case of *Fergus v. Marks*, which arose out of the failure of the Illinois Legislature to reapportion senatorial districts since 1901, although its constitution requires decennial revision. The petition of a citizen and a taxpayer for a writ of mandamus to compel the members of the legislature to meet and apportion the state in accordance with the constitution was denied on the ground that the judiciary could not exercise control over a co-ordinate branch of the government. The Supreme Court of the United States would be equally reluctant to issue a mandamus against all the members of the Senate and the House of Representatives.

"As a natural consequence, the Supreme Court would also probably decline to hold that leg-

islation by an unrevised House of Representatives or elections by an unrevised Electoral College were invalid. After the defeat just described, the same Illinois taxpayer, in *Fergus v. Kenny*, asked leave to file a bill in equity to restrain the state treasurer from paying the salaries and expenses of the next Legislature on the ground that its members would not be validly elected. He lost again. The court said that the legislature had uncontrolled discretion as to the performance of its mandatory duties. The under-represented population of Chicago must console itself with the words of Mr. Justice Holmes:

> " 'It must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts'. (*Missouri, K. & T. Ry. v. May*, 194 U. S. 267, 270, 1904).

"If the validity of the continuance of the Congressional apportionment of 1911 were similarly tested, it seems probable that the Supreme Court of the United States would declare that reapportionment is a political question with which it has no concern. An ingenious argument to the contrary has been made by Professor W. S. Meyers, of Princeton University, who suggests that a close presidential election could be successfully contested in the courts on the ground that a different result would have been reached if the distribution of the Electoral College had been altered by a proper apportionment. Such an argument would carry us very far. It must rest on the assumption that the apportionment of 1911 became invalid at some definite date, for instance, March 4, 1923, when the first congress chosen after the 1920 census adjourned. It would then follow that all legisla-

tion enacted since that date was void and could be disobeyed with impunity. Furthermore, no subsequent congress could make a new apportionment since none could be validly elected. The courts themselves would have to take over the function of reapportioning Congress, and decide the size of the House and the comparative merits of competing schemes. They would then have to order the redistricting of the states and a new election of presidential electors and representatives, and see to the enforcement of their decrees. If the Congress elected under the old apportionment persisted in sitting, the persons elected under court orders would have to gain possession of the chamber by judicial process if they could find marshals to execute it. Such a picture is a sufficient answer to this interesting argument.

"Yet, although no legal consequences will follow from the continued delay of Congress in performing its constitutional duty, the practical consequences will become increasingly undesirable. In a republic, laws gain their chief sanction from the consent of the governed. As soon as the feeling becomes widespead that these laws are the result of the violation of the Constitution by those who are most clearly bound to respect it, the moral support of law will gradually weaken. Although it cannot be compelled, reapportionment immediately after the 1930 census is a political obligation. Fortunately, Congress has recently shown a renewed determination to legislate on this subject. In so doing, it is doubly important that a satisfactory statute be enacted, as a permanent solution of a long standing federal problem and as an effective example of fairness to the states."

The article then continues by giving the various methods that have been used by Congress when reapportionment acts were passed by that body.

Article 1, Section 4, paragraph 1, of the Constitution gives to Congress absolute power in reference to the manner of holding elections for Representatives. The districting of a state is a legislative power and not a judicial power.

The power is granted to Congress and the courts have no jurisdiction thereof.

In the case of *Veazie Bank v. Fenno*, 75 U. S. 333, 19 L. Ed. 482, text page 487, the Court held as follows:

> "It is insisted, however, that the tax in the case before us is excessive, and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the Bank, and is, therefore, beyond the constitutional power of Congress.
>
> "The first answer to this is that the Judicial cannot prescribe to the Legislative Departments of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the Legislature is not to the courts, but to the people by whom its members are elected. So, if a particular tax bears heavily upon a corporation, or class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution."

The Constitution authorizes the President of the United States to appoint postmasters by and with the ad-

vice and consent of the United States Senate. In the case of Myers vs. U. S., 272 U. S. 52, 71 L. Ed. 160, the Supreme Court of the United States held that this power was an executive power and that the President had the right to remove a postmaster so appointed with the consent of the Senate.

It appears, from a careful study of these opinions, that when a power is given to one branch of the federal government, the other branches of government have nothing to do with or any control over such power.

The Constitution gives to Congress the right to control the elections of its members and, therefore, the courts cannot have any power over Congress.

In the case at bar, if the State of Mississippi has not been redistricted in accordance with the Act of Congress, then Congress, and Congress alone, may correct this error. The Court has no jurisdiction to do so.

In the case of *Springer vs. Philippine Islands*, 272 U. S. 189, 72 L. Ed. 845, the Court held as follows:

> "It may be stated then, as a general rule inherent in the American constitutional system, that, unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power; the judiciary cannot exercise either executive or legislative power. The existence in the various constitutions of occasional provisions expressly giving to one of the departments powers which by their nature otherwise would fall

within the general scope of the authority of another department emphasizes, rather than casts doubt upon, the generally inviolate character of this basic rule.

"Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions. It is unnecessary to enlarge further upon the general subject, since it has so recently received the full consideration of this court. *Myers v. United States*, 272 U. S. 52, 71 L. ed. 160, 47 Sup. Ct. Rep. 21."

In the case of *Wilson vs. Shaw*, 204 U. S. 24, this Court held as follows:

"These show a full ratification by Congress of what has been done by the Executive. Their concurrent action is conclusive upon the courts. We have no supervising control over the political branch of the govenment in its action within the limits of the Constitution. *Jones vs. United States*, 137 U. S., 202, 34 L. ed. 691, 11 Su. Ct. Rep. 80, and cases cited in the opinion: *Re Cooper*, 143 U. S. 472, 499, 503, 36 L. ed. 232, 240, 242, 12 Sup. Ct. Rep. 453."

In *Jones vs. U. S.*, 137 U. S. 202, the rule is again stated in the following language:

"Who is the soverign, de jure or de facto, of a territory is not a judicial, but a political, question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other

officers, citizens, and subjects of that government. This principle has always been upheld by this court and has been affirmed under a great variety of circumstances. *Gelston v. Hoyt*, 16 U. S. 3 Wheat, 246, 324 (4: 381, 401); *United States v. Palmer;* Ia. 610 (471); The Divina Pastora, 17 U. S. 4 Wheat, 52 (4: 512); *Foster v. Neilson*, 27 U. S., 2 Pet. 253, 307, 309 (7: 415, 433, 434); *Keene v. McDonough*, 33 U. S., 8 Pet. 308 (8: 955); *Garcia v. Lee*, 37 U. S. 12 Pet.., 511, 520 (9: 1176); *Williams v. Suffolk Ins.* Co. 38 U. S. 13 Pet. 415 (10: 226); *United States v. Yarba*, 68 U. S. 1 Wall, 412, 423 (17: 635, 637); *United States v. Lynde*, 78 U. S. 11 Wall, 632, 638 (20: 230, 232). It is equally well settled in England. The Pelican, Edw. Adm. Appx. D., *Taylor v. Barclay*, 2 Sim. 213; *Emperor of Austria v. Day*, 3 Deg. F. and J., 217, 221, 233; *Republic of Peru v. Peruvian Guano Co.*, L. R. 36, Ch. Div. 489, 497; *Republic of Peru v. Dreyfus*, L. R. 38 Ch. Dic. 348, 356, 359."

In the case of *Taylor v. Beckham*, 178 U. S. 548, this court again defines the limit of the power of the courts in the following language:

"As remarked by Chief Justice Tanney in *Luther v. Borden*: 'The high power has been conferred on this court of passing judgment upon the acts of the state soverignties, and of the legislative and executive branches of the Federal Government, and of determining whether they are beyond the limits of power marked out for them respectively by the Constitution of the United States. This tribunal, therefore, should be the last to overstep the boundaries which limit its own jurisdiction. And, while it should always be ready

> to meet any question confided to it by the Constitution, it is equally its duty not to pass beyond its appropriate sphere of action, and to take care not to involve itself in discussions which properly belong to other forums'."

Article XIV, Section 2, of the Constitution of the United States provides that if a State denies the right of suffrage to any of the male inhabitants being twenty-one years of age, and citizens of the United States, the basis of representation in such state shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Now, suppose a tax payer, qualified elector and candidate for Congress were to file a bill in the Federal Court in equity, and allege that one-sixth of the male inhabitants over the age of twenty-one years in the State of Mississippi were denied the right of suffrage, and pray that the Court enjoin the election of seven Congressmen because such denial by the State of Mississippi is in conflict with such section. Would this Court entertain jurisdiction thereof? Certainly not, it is a power vested in Congress and this Court would not exercise any power over Congress.

Article IV, Section 4, Constitution of the United States, provides as follows:

> "The United States shall guarantee to each State in the Union a republican form of government."

In the case of *Luther v. Borden*, 7 How., page 1, the facts appeared to be substantially as follows:

The Constitution of Rhode Island at the time it joined the Union did not provide any mode by which the Constitution might be amended. In 1841, a portion of the people of said State held meetings, formed associations and elected delegates to a convention. This convention adopted a constitution which was submitted to and approved by the people. In 1843 the charter government, which did not acquiesce in these proceedings, framed a new constitution and put it into operation. Plaintiff in said cause contended that the Constitution of 1841 was valid and that the Constitution of 1843 was invalid. The General Assembly of the State of Rhode Island recognized the last mentioned Constitution.

The Court in deciding said case held as follows:

> "Certainly, the question which the plaintiff proposed to raise by the testimony he offered has not heretofore been recognized as a judicial one in any of the State courts. In forming the constitutions of the different states, after the Declaration of Independence, and in the various changes and alterations which have since been made, the Political Department has always determined whether the proposed constitution or amendment was ratified or not by the people of the State, and the judicial power has followed its decision. In Rhode Island, the question has been directly decided. Prosecutions were there instituted against some of the persons who had been active in the forcible opposition to the old government. And in more

than one of the cases evidence was offered on the part of the defense similar to the testimony offered in the Circuit Court, and for the same purpose; that is, for the purpose of showing that the proposed constitution had been adopted by the people of Rhode Island, and had, therefore, become the established government, and consequently that the parties accused were doing nothing more than their duty in endeavoring to support it.

"But the courts uniformly held that the inquiry proposed to be made belonged to the political power and not to the judicial; that it rested with the political power to decide whether the charter government had been displaced or not; and when that decision was made, the Judicial Department would be bound to take notice of it as the paramount law of the State, without the aid of oral evidence or the examination of witnesses."

In the case of *Mountain Timber Co. v. Washington*, 243 U. S. 219, this Court held as follows:

"Two of the constitutional objections may be disposed of briefly. It is urged that the law violates Section 4 of Article 4 of the Constitution of the United States, guarantying to every state in the Union a republican form of government. As has been decided repeatedly, the question whether this guaranty has been violated is not a judicial but a political question, committed to Congress, and not to the courts. *Luther v. Borden*, 7 How. 1, 39, 42, 12 L. Ed 581, 597, 599; *Pacific States Teleph. & Teleg. Co. v. Oregon*, 223 U. S. 118, 56 L. ed. 377, 32 Sup. Ct. Rep. 224; *Kierman v. Portland*, 223 U. S. 151, 56 L. ed. 386, 32 Sup. Ct. Rep. 231; *Marshall v. Dye*, 231 U. S. 250, 256; 58 L. ed.

206, 34 Sup. Ct. Rep. 92; *Ohio ex rel Davis v. Hildebrandt*, 241 U. S. 565, 60 L. ed. 1172, 36 Sup. Ct. Rep. 708."

In *State of Ohio vs. Hildebrandt*, 241 U. S. 565, it appears that the Constitution of the State of Ohio provided for a referendum and recall; that after said section of the Constitution became effective the State Legislature redistricted the State. Under the referendum clause of the Constitution a vote was called and the redistricting act declared void. It was contended that the referendum was repugnant to Section 4, Article I of the Constitution. The Court held as follows:

> *"To the extent that the contention urges that to include the referendum within state legislative power for the purpose of apportionment is repugnant to Section 4, of article 1 of the Constitution and hence void, even if sanctioned by Congress, because beyond the constitutional authority of that body, and hence that it is the duty of the judicial power so to declare, we again think the contention is plainly without substance."*

In the case of *Marshall vs. Dye*, 231 U. S. 250, this Court held as follows:

> "The contention mainly urged by the plaintiffs in error of the denial of Federal rights is that the jurgment below is in contravention of article 4, Section 4 of the Constitution of the United States, which provides that the United States shall guarantee to every state in the Union a republican form of government. In *Pacific States Teleph. & Teleg. Co. v. Oregon*, 223 U. S.

118, 56 L. ed. 377, 32 Sup. Ct. Rep. 224, this court had to consider the nature and character of that section, and held that it depended for enforcement upon political and governmental action through powers conferred upon the Congress of the United States."

It will, therefore, be seen from these decisions of the Court, and the other decisions cited therein, that Article IV, Section 4 of the Constitution guarantees to the states a republican form of government. The Court holds that this power is vested in Congress, or the political department of the government, and the courts are bound by the acts of Congress in reference thereto.

Article 1, Section 4, the section in controversy in this case, clearly gives Congress the right to redistrict the states for the purpose of electing representatives in Congress. The Congress is, therefore, supreme in this field and the Court is without jurisdiction to hold an act of Congress or an act of the State Legislature unconstitutional.

If the power is vested by the Constitution in Congress in such cases as the case at bar, then the Congress can correct the inequalities of state legislation. Said section 4, Article 1, grants to Congess the power to alter the state regulations or to make new regulations. This remedy is complete and effective.

If the power is vested in the Courts, then the only judgment such courts could render would be to declare the state act null and void. It could not make a new law that would be in accord with the Constitution and statutes.

There is nothing in the cases of *Smylie vs. Holm*, 284 U. S. 616, 52 Sup. Ct. Rep. 266; *Koenig vs. Flinn*, 52 Sup. Ct. 403, or *Carroll vs. Becker*, 52 Sup. Ct. 402, recently decided by this Court, that is in conflict with the views expressed in this brief.

Each of said suits was begun in the State Court by petition for writ of mandamus, and brought to this Court by appeal from the various state supreme courts. *The question of equitable jurisdiction to prevent a deprivation of a political right did not arise.*

The question presented in each of said cases was whether the state legislature *had acted* and not whether *an act* of the legislature *was valid*. The Court held that the legislature had not acted.

V.

HOUSE BILL NO. 197, REGULAR SESSION OF THE LEGISLATURE OF 1932 DOES NOT CONTRAVENE ANY OF THE PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES OR THE LAWS THEREOF, BECAUSE SECTION 4, ARTICLE I, OF THE CONSTITUTION AND THE ACT OF CONGRESS OF 1911 ARE DIRECTORY AND NOT MANDATORY.

In the cases of *Smylie vs. Holm, supra, Koenig vs. Flinn, supra,* and *Carroll vs. Becker, supra,* this Court, while not expressly so deciding, recognized that the provisions of the Constitution and statutes in controversy were directory merely and not mandatory. Neither the

constitution nor the statutes provide that the election of representatives in Congress shall be from the State at large in the event the State fails to enact a redistricing act. However, this Court held such to be the rule. Now, if the Court had been of the opinion that said provisions were mandatory it would, of necessity, have held that the State would be without representation until the State was redistricted.

In the case of *Wood vs. State*, 142 So. Rep. 747, not yet officially reported, when the Supreme Court of Mississippi had before it the same statutes and facts as are involved in this case, Justice Ethridge filed a specially concurring opinion, concurred in by Justice Anderson. This proposition is so learnedly reasoned and is so well supported by the decisions of this Court, as well as by decisions of courts of other jurisdictions, I take the liberty of quoting said opinion in full:

"ETHRIDGE, J. (specially concurring).

The PER CURIAM opinion, in which I fully concur, decides all that is necessary to dispose of this case. But, in view of the public interest, and the desirability of knowing the law pertaining to the merits of the case, and following the precedent of *Marbury v. Madison*, 1 Cranch, 137, 2 L. Ed. 60, I desire to submit the following views.

"The basis upon which the mandamus in the case at bar is sought is that the redistricting act is void because of inequality in population in the several districts, and because it is in conflict with section 3 of the Act of Congress of August 8, 1911 (2 USCA § 3), reading, in part, as fol-

lows: 'In each State entitled under this apportionment to more than one Representative, the Representatives to Congress shall be elected by districts composed of contiguous and compact territory, and containing, as nearly as practicable, an equal number of inhabitants. The said districts shall be equal to the number of Representatives to which such State may be entitled in Congress, no district electing more than one Representative.' 37 Stat. 14.

"By an analysis of this statute, it will be seen that it is directory, and especially as to the feature directing districts to be contiguous, compact, and of nearly equal population. Congress itself did not undertake to create districts, nor did it undertake to prohibit a variance of more than a given number of inhabitants in each district, so that there is no statement by which the judiciary can measure what will be an equal number of inhabitants, or what would constitute a compact territory.

"The one mandatory feature, if it can be said to be mandatory, is that the election be by districts, and that no district shall elect more than one Representative. It was clearly the dominant purpose and desire of Congress that the election should be by districts, and that there should be as many districts as Representatives allowed the state in Congress. The number of Representatives is fixed by the congressional act, and to grant a mandamus, or declare the act void, would be to thwart the dominant purpose of Congress in directing the state to be divided into districts. It is true that if Congress had desired to enact in detail and by specified territory and population how districts should be laid off, it could have so done, but as Congress did not

express its own judgment as to what territory should compose the districts, or what population each district should contain, it necessarily left it to the legal discretion and judgment of the state Legislature as to what constitutes a contiguous and compact terriory, and, the discretion being so left by an act of Congress, this court cannot control that discretion. It cannot substitute its own judgment for that of the legislative body. It seems to me that there can be no doubt about the act being directory. *Hubbert v. Campbellsville* L. Co., 191 U. S. 70, 24 S. Ct. 28, 48 L. Ed. 101; *French v. Edwards*, 13 Wall, 506, 20 L. Ed. 702; 2 Words and Phrases, Second Series, 53; *Lang v. Harrison County*, 114 Miss. 341, 75 So. 126; *Rosenstock v. Board of Sup'rs of Washington County*, 112 Miss. 124, 72 So. 876. It is clearly directory in reference to the kind of districts that shall be created.

"We know that, in dealing with subjects of this kind, there are many factors entering into the minds of legislators in creating districts. However much we might be disposed to differ with the Legislature as to the propriety and wisdom of the act, it is a question for the Legislature itself to determine, and the court will not undertake to control the Legislature in its respective separate department of state government.

"It is to be regretted that there is considerable inequality of population, but no one believes that any district can be created that is absolutely equal in population and shape to every other district. This state has never had such a system of districts, nor has any other state been able to lay off congressional districts with exact equality as to size, shape, and population.

"We should subordinate the secondary considerations of the act to the primary or dominant ones. It is clearly more desirable that there should be districts than that they should be equal. In our own state, for instance, on the west boundary is the great Mississippi river country subject to overflow, much of the territory of the state lying within the area so subject. Levee protection is the chief benefit of government to this area. They might subordinate other things to flood protection. A portion of the state borders on the Gulf of Mexico, and is interested in port improvement and commercial enterprises. Other sections of the state, removed from rivers and harbors, have no particular interest in such projects, being chiefly engaged in other pursuits. Each group having one Representative is represented more than it would be if Congressmen shall be elected from the state at large. Under the bill as drawn, each district of the state is assured of one Representative to speak for it in the national House of Representatives. Should the circuit court be followed, this assurance will be destroyed, as all the Congressmen might be elected from one territory to the great detriment of the rest of the people of the state.

"No doubt the Legislature gave much time to the consideration of this redistricting bill. It seldom happens that everybody can be pleased. The journals show a number of bill were introduced, having different divisions of territory and population from the one under review. This shows a diversity of opinion in the Legislature on the subject. For this reason also, I think the public interest can be best served by not disturbing its finding. There was no state constitutional restriction upon the Legislature in creating districts, and therefore the Legislature was in full posses-

sion of power and discretion vested in it by section 4, art. 1, United States Constitution. The Constitution having given Congress the power to make laws and alter laws, by implication, necessarily excludes every other power than Congress from disturbing what the state Legislature has enacted. Neither the State nor the Federal Constitution imposes any restriction upon how the state shall act in the matter, nor of how Congress shall act upon the matter, except that it shall act in the exercise of the law-making methods, and its regulations must be lawful. Expressio unius est exclusio alterius. This maxim is of universal statutory construction. *United States v. De la Maza Arredondo*, 6 Pet. 691, 8 L. Ed. 547. When an expression is used in a general statute, it excludes all other than this expression. *Kendall v. U. S.*, 107 U. S. 123, 2 S. Ct. 277, 27 L. Ed. 437. What a statute allows to be done in a particular mode conclusively negatives any other mode. *Raleigh & Gaston R. R. Co. v. Reid*, 13 Wall, 269, note, 20 L. Ed. 570. Where the Legislature grants authority to do a thing in a certain way, by necessary implication it prohibits the doing of it in any other way. *Stephans v. Smith*, 10 Wall. 321, 19 L. Ed. 933.

"From this section it will be seen that the framers of the Constitution were dealing with the elective branch of the national government; the one branch of the government that was given to the people themselves in elections to be held for that purpose.

"It was never contemplated that either the judicial or executive departments should have any control over the election of the people's representatives, the only direct touch

and control that the people have over their government. The framers of this government were careful to divide it into three departments, and to have these departments separate and distinct; and, not being content to leave the matter entirely in the states' discretion, for fear the states might fail to act in electing their Representatives, it was considered proper to vest some control in the national authorities. It was also considered proper to vest this control in the national Legislature, and, having named the party who would correct the act of the state when it needed correction, the control cannot be delegated to any other agency. It is true every state constitutional provision is subject to the restraint of the Federal Constitution when it clashes with the Federal Constitution. Construction of the State Constitution by a state court is, of course, a different thing from the construction of the Federal Constitution by a state court. It would be permissible for the legislative power to lay restraints upon themselves, or the people could do so in Constitutional Convention assembled. This was held in the case of *Ohio v. Hildebrant*, 241 U. S. 565, 36 S. Ct. 708, 60 L. Ed. 1172, in which the Ohio court held that the referendum provisions of the State Constitution were a part of the legislative power, and that elections in pursuance thereof were valid so far as that power of the Supreme Court of the United States was concerned. To the same effect is the case of *Mountain Timber Co. v. State of Washington*, 243 U. S. 219, 37 S. Ct. 260, 61 L. Ed. 685, Ann. Cas. 1917D, 642.

"The power to control the states being vested in Congress by express language in regard to the time and manner of holding elections for Congressmen makes it a legislative

or political power which is separate from, and independent of, the other departments of government. The determination of that question is exclusively for Congress, and state enactments are valid until Congress has acted, and so far as they do not conflict with the enactments of the United States Congress. In other words, if Congress has acted, and the state has acted, both enactments stand if not in conflict, and if they do conflict, the state being subject to limitations, the Congress is supreme. *Re Siebold*, 100 U. S. 371, 25 L. Ed. 717; *Re Yarbrough*, 110 U. S. 651, 4 S. Ct. 152, 28 L. Ed. 274; *Re Coy*, 127 U. S. 731, 8 S. Ct. 1263, 32 L. Ed. 274; *United States v. Mosley*, 238 U. S. 383, 35 S. Ct. 904, 59 L. Ed. 1355.

"The power conferred on Congress by the Constitution cannot be conferred upon another department. *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. Ed. 377; *Re Garland*, 4 Wall. (71 U. S.) 333, 18 L. Ed. 366.

"Under the provisions of the Federal Constitution by which the United States guarantees to every state a republican form of government, the courts have no power to determine whether a particular government is republican in form or not; that question being entirely for the political department of government. *Luther v. Borden*, 7 How. 1, 12 L. Ed. 581; *Pacific States Telephone Co. v. Oregon*, 223 U. S. 118, 32 S. Ct. 224, 56 L. Ed. 377; *Georgia v. Stanton*, 6 Wall. 49, 18 L. Ed. 723-725, where it is said: 'This distinction results from the organization of the government into the three great departments, Executive, Legislative, and Judicial—and from the assignment and limitation of the powers of each by the Constitution. The judicial power

is vested in one Supreme Court, and in such inferior courts as Congress may ordain and establish; the political power of the government in the other two departments. The distinction between judicial and political power is so generally acknowledged in the jurisprudence both of England and of this country, that we need do no more than refer to some of the authorities on the subject. They are all in one direction. *New York v. Conn.*, 4 Dall. 4 (1 L. Ed. 717); *Nabob of Carnatico v. E. I. Co.*, 1 Ves. Jr. 375; (S. C.) 2 Ves. Sr. 446, 447; *Cherokee Nation v. Georgia*, 5 Pet. 1 (8 L. Ed. 25). * * * The remaining question on this branch of our inquiry is, whether, in view of the principles above stated, and which we have endeavored to explain, a case is made out in the bill of which this court can take judicial cognizance. In looking into it, it will be seen that we are called upon to restrain the defendants, who represent the executive authority of the government, from carrying into execution certain acts of Congress, inasmuch as such execution would annul and totally abolish the existing state government of Georgia, and establish another and different one in its place; in other words, would overthrow and destroy the corporate existence of the state by depriving it of the means and instrumentalities whereby its existence might, and otherwise would, be maintained. This is the substance of the complaint, and of the relief prayed for. The bill, it is true, sets out in detail the different and substantial changes in the structure and organization of the existing government, as contemplated in these acts of Congress; which, it is charged, if carried into effect by the defendants, will work this destruction. But, they are grievances, because they necessarily and inevitably tend to the

overthrow of the state as an organized political body. They are stated, in detail, as laying a foundation for the interposition of the court to prevent the specific execution of them; and the resulting threatened mischief. So in respect to the prayers of the bill. The first is that the defendants may be enjoined against doing or permitting any act or thing, within or concerning the state, which is or may be directed or required of them, by or under the two acts of Congress complained of; and the remaining four prayers are of the same character, except more specific as to the particular acts threatened to be committed. That these matters, both as stated in the body of the bill, and in the prayers for relief, call for the judgment of the court upon political questions, and upon rights, not of persons or property, but of a political character, will hardly be denied. For the rights, for the protection of which our authority is invoked, are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a state, with all its constitutional powers and privileges. No case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill, in a judicial form, for the judgment of the court. It is true, the bill in setting forth the political rights of the state, and of its people to be protected, among other matters, avers that Georgia owns certain real estate and buildings therein, State Capitol, and Executive Mansion, and other real and personal property; and that putting the acts of Congress into execution, and destroying the state, would deprive it of the possession and enjoyment of its property. But it is apparent that this reference to property and statement concerning it, are only by way of showing one of the grievances resulting from the threatened destruction of the

state, and in aggravation of it, not as a specific ground of relief. This matter of property is neither stated as an independent ground, nor is it noticed at all in the prayers for relief. Indeed, the case, as made in the bill, would have stopped far short of the relief sought by the state, and its main purpose and design given up, by restraining its remedial effect, simply to the protection of the title and possession of its property. Such relief would have called for a very different bill from the one before us'.

"See, also, *Mississippi v. Johnson*, 4 Wall. 475, 18 L. Ed. 441, 500, where the court said: 'The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance. The impropriety of such interference will be clearly seen upon consideration of its possible consequences. Suppose the bill filed and the injunction prayed for allowed. If the President refuse obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court and refuses to execute the acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the government? May not the House of Representatives impeach the President for such refusal? And in that case could this court interfere, in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this court to arrest proceedings in that

court? These questions answer themselves. It is true that a State may file an original bill in this court. And it may be true, in some cases, that such a bill may be filed against the United States. But we are fully satisfied that this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be received by us'.

"It seems to me that no more important right can be conferred than the one in this case. It gives the people of the state a representative form of government, provided Congress enforces the regulations; but even should the state, or some one in its name who has seized the political power and usurped all the powers of the state, enact a measure not in conflict with the enactments of Congress, then the courts would be powerless to intervene.

"Again, the Federal Constitution provides that a person who has committed a crime in one state, and is found in another state, on demand of the executive of the state where the crime was committed, may be arrested by the executive of that other state, and delivered to the state where the crime was committed. Under this section of the Constitution, the courts cannot compel compliance. *Kentucky v. Dennison*, 24 How. 66, 16 L. Ed. 717; *Taylor v. Taintor*, 16 Wall. 366, 21 L. Ed. 287.

"Questions of a political nature are exclusively for the determination of Congress.

"It belongs to the political department to determine when belligerency shall be recognized, and its action must be

accepted according to the terms and intentions expressed. *United States v. The Three Friends*, 166 U. S. 1, 17 S. Ct. 495, 41 L. Ed. 897.

"The federal Supreme Court has no supervising power or control over the political branch of the government in its action within the limits of the Constitution. *Wilson v. Shaw*, 204 U. S. 24, 27 S. Ct. 233, 51 L. Ed. 351.

"For the reasons named, I am of opinion that it was error to have granted the writ of mandamus, and that the judgment should be reversed, and the petition dismissed."

OPINION OF THE COURT BELOW

The opinion of the majority of the Court below in holding that this Court has jurisdiction and that the injunction ought, therefore, to issue, is based upon the decision of this Court in the case of *United States vs. Mosley*, 238 U. S. 383. The suit in said case was an indictment under Section 19 of the Criminal Code, Act of March 4, 1909, Chapter 321, 35 Statutes at Large 1008; Compiled Statutes 1913, Sections 10165, 10183.

The indictment charged certain state election officials with a conspiracy to omit the returns of certain precincts in an election for a member of Congress from the count and returns to the State Election Board. The Court held that the statute was constitutional, and held that a voter was entitled to have his vote counted. The pertinent part of the opinion is as follows:

"It is not open to question that this statute is

constitutional and constitutionally extends some protection, at least, to the right to vote for members of Congress. *Ex parte Yarbrough,* 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. 152; *Logan v. United States,* 144 U. S. 263, 293, 36 L. ed. 429, 439, 12 Sup. Ct. Rep. 617. We regard it as equally unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box."

In the case of *Ex Parte Yarbrough,* 110 U. S. 651, cited in the *Mosley case, supra,* this Court held as follows:

"In such cases this 15th article of Amendment does *proprio vigore,* substantially confer on the negro the right to vote, and Congress has the power to protect and enforce that right.

"In the case of *U. S. v. Reese,* so much relied on by counsel, this court said in regard to the 15th amendment that 'It has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. *That right is an exemption from discrimination in the exercise of the elective franchise on account of race, color or previous condition of servitude.*' This new constitutional right was mainly designed for citizens of African descent. The principle, however, that the protection of the exercise of this right is within the power of Congress, is as necessary to the right of other citizens to vote as to the colored citizen, and to the right to vote in general as to the right to be protected against discrimination.

"The exercise of the right in both instances is guaranteed by the Constitution and should be

kept free and pure by congressional enactments whenever that is necessary."

In the case of *Logan vs. United States*, 144 U. S. 263, also cited in the Mosley case, this Court held as follows:

> "Among the particular rights which this court, as we have seen, has adjudged to be secured, expressly or by implication, by the Constitution and laws of the United States, and to be within section 5508 of the Revised Statutes, providing for the punishment of conspiracies by individuals to oppress or injure citizens in the free exercise and enjoyment of rights so secured, are the political right of a voter to be protected from violence while exercising his right of suffrage under the laws of the United States; and the private right of a citizen, having made a homestead entry, to be protected from interference while remaining in the possession of the land for the time of occupancy which Congress has enacted shall entitle him to a patent."

In each of these three cases it appears that the question involved in said cases was the provision of the fourteenth amendment to the Constitution. This amendment provides that a person shall not be denied the right of suffrage on account of race, color or previous condition of servitude.

The statutes construed in said cases were statutes making it a criminal offense to conspire against or to in any way interfere with a person's right to vote on account of his race, color or previous condition of servitude.

None of these questions is involved in the case at bar.

The dissenting opinion of Judge Holmes has not yet been officially reported, and is printed in this brief as Appendix A. The opinions cited by Judge Holmes have been cited and discussed elsewhere in this brief.

THE DECISIONS OF THE STATE COURT

The attorneys for appellee in this case, representing C. E. Brumfield, brought a suit in the Chancery Court of Pike County, Mississippi.

Practically the same facts were alleged and the same relief prayed for as in the case at bar. This case was appealed to the Supreme Court of Mississippi. Its opinion has not yet been officially reported, but is published in Advance Sheet No. 5, Volume 142 Southern Reporter, a copy of which is filed herewith.

The attorneys for appellee in this case, representing Hugh Gillespie, District Attorney, brought a suit in the name of the State against Walker Wood in the Circuit Court of Hinds County, Mississippi, for a writ of mandamus. Practically the same facts were alleged and the same relief petitioned for as in the case at bar. The opinion of the Supreme Court of Mississippi has not yet been officially reported in this case, but is found published in Advance Sheet No. 5, Volume 142 Southern Reporter, a copy of which is filed herewith.

CONCLUSIONS

I, therefore, most respectfully submit that the decree of the District Court should be reversed and the original bill dismissed for the following reasons, to wit:

1. The plaintiff in the Court below had a plain, adequate and speedy remedy at law.

2. A Federal Court of Equity has no jurisdiction to enforce a political right.

3. The right or power to district a state for the purpose of electing representatives in Congress is vested in Congress and the State Legislature, and the Courts have no jurisdiction thereof.

4. The provisions of Section 4, Article 1 of the Constitutin are directory and not mandatory.

SUPPLEMENT

POINT I.

ASSUMING THAT CONGRESS HAD AUTHORITY TO PROVIDE THAT CONGRESSIONAL DISTRICTS SHOULD BE COMPACT, CONTIGUOUS, AND AS EQUAL IN INHABITANTS AS PRACTICABLE, CONGRESS BEING THE SOLE JUDGE THEREOF, HAS CONSTRUED THE STATUTE AS NOT BEING MANDATORY BUT DIRECTORY, AND AS AN ADMINISTRATIVE MATTER, EXCLUSIVELY FOR THE STATES.

We reiterate that, as has been previously stated, the question as to the compactness and equality of number of inhabitants, is a Congressional-political, and not a judicial question.

Certainly the Congress could not be required to pass a reapportionment bill. *Yost v. Dallas County,* 236 U. S. 50; and although it might be the duty of the Governor of a State to honor the requisition of the executive of another state, such action could not be judicially required. *Kentucky v. Dennison,* 24 How. 66.

Paragraph 1, Section IV, Article I, of the Constitution of the United States, is in the following language:

> "The Time, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chosing Senators."

In pursuance of said provision in the Constitution of the United States, following the census of 1910, and effective August 8, 1911, the Congress passed the Act under review, providing that Representatives to Congress should be elected by districts, composed of contiguous and compact territory, and containing, as nearly as practicable, an equal number of inhabitants.

For a period of fifty years after the adoption of the Federal Constitution, Congress was content with fixing the number of Representatives, and apportioning them among the States.

In 1842, the Congress, for the first time, asserted the right to require members of the House of Representatives to be elected by districts, composed of contiguous territory.

Following the apportionment had in 1850, the Congress made no provision for election by districts.

In 1862, the plan of electing Representatives by districts was again invoked, and the apportionment act provided that the election should be by districts composed of contiguous territory.

Following the census of 1870, the next decennial apportionment was in 1872, and not only did the act require members of the House of Representatives to be elected by districts, composed of contiguous territory, but it contained the further provision that such districts should contain. as nearly as practicable, an equal number of inhabitants.

The same provision was found in each decennial apportionment act, from 1872 to, and including the present act, of 1911, which act still remains in force.

Some doubt was expressed as to whether or not, under the Constitution of the United States, the Congress had any authority to provide the boundaries of Congressional districts.

Following the enactment of the apportionment act of 1842, Congressional elections were held in several states from the state at large, notwithstanding the positive provision of Section 2, of that act, providing for the election of members of the House of Representatives from districts. In a number of states, including Mississippi, members of the House of Representatives were elected from the state at large. Contests were instituted before the House of

Representatives, and a majority of the Committee on Elections held that Congress was without power or authority to require members of the House of Representatives to be elected from districts.

This view was ably supported in a lengthy report submitted by Hon. Stephen A. Douglas, of Illinois. See McCrary on Elections, 4th Edition, Sections 191, 192.

The members of Congress from the State of Mississippi, elected from the state at large, were, therefore, seated, notwithstanding Section 2 of the Act of 1842, providing that they should be elected from districts.

The report of the Committee will be found First Volume, Bartlett on Contested Elections, 47-55.

This ruling was adhered to in the later case of *Phelps v. Cavanaugh*. See Bartlett on Contested Elections, page 248.

The matter was again presented to the House of Representatives in the case of *Davidson v. Gilbert*, at the second session of the Fifty-sixth Congress.

The Committee, in effect, stated that if Congress had the power to regulate the boundaries of Congressional districts, that the right should not be exercised, but that the question should be left, as an administrative feature of state government.

The question was again reviewed in the Sixty-first Congress, in the case of *Parsons v. Saunders*. The con-

test arose over a redistricting act, enacted by the Legislature of the State of Virginia.

The Committee in that case disagreed with the report of the Congressional Committee, in the case of *Davidson v. Gilbert*, and held that Congress did have the right and power, under the provision of the Constitution hereinbefore set out, to provide the boundaries of Congressional districts, etc.

We will endeavor to obtain, for the benefit of the Court, and file herewith, a copy of the report of the Congressional Committee on Elections, in that case.

Notwithstanding, however, the asserted right of Congress to legislate upon the subject matter, it elected not to take action, and permitted the member to retain his seat.

In other words, the House of Representatives construed the statute as being not mandatory, but directory, and that the question of boundaries, etc., of Congressional districts was an administrative feature, which should be left to the states.

It must be borne in mind that the House of Representatives of the United States then had, and now has Congressional machinery for the purpose of deciding, and giving effect to its decision in such cases. See Chapter 7, Title 2, U. S. C. A. Annotated, on Contested Elections.

Since the before mentioned date, while the House of Representatives has affirmed its right to pass the act, it

being the sole judge thereof, it has left the question to the Legislatures of the various states. The result has been that Congress has not required either contiguity, compactness or equality in the number of inhabitants of Congressional districts.

We refer the Court to the Congressional Directory, third session, Sixty-second Congress, beginning on page 407 will be found a map of Congressional districts, made following the 1910 census.

The districts were not compact, and the same may be said as to equality of number of inhabitants. We will illustrate this by a few instances taken from state legislative apportionment acts, following the census of 1910, and the Congressional Act of 1911.

In the State of California, the smallest district had a population of 184,274; the largest 504,131.

In Alabama, the smallest district was composed of 193,958 inhabitants; the largest of 301,945.

In Missouri, 142,621 in the Eighth District, 416,389 in the Tenth District.

In North Carolina, 170,775 in the Third District, 330,-474 in the Fifth District.

In Ohio, 156,636 in the Fifth District, 367,970 in the Twenty-first District.

The same may be said of state redistricting acts, following the census of 1930.

The State of Alabama has one district with 250,000 inhabitants; another district with 450,000 inhabitants.

South Dakota has one district with 200,000 inhabitants; another with 650,000 inhabitants.

Michigan has one district with 225,000; another with 400,000 inhabitants.

The State of California has one district with 165,000; another with 350,000 inhabitants.

In the State of Ohio, the smallest district has 168,281 inhabitants, and the largest 633,818.

Pennsylvania's smallest district has 125,332 inhabitants, and the largest has a population of 445,109.

In the State of Tennessee, the smallest district is 195,000, and the largest 380,000.

Congress having authority to pass the Act, the action of the House of Representatives, in construing the Act, as not being mandatory, but directory, and embracing a matter which should be left to the Legislatures of the respective states, rests upon solid ground, which is especially applicable to the present case.

The reason for the passage of the Act providing for compact, contiguous districts, of equal number of inhab-

itants, as near as practicable, was doubtless to prevent what is known as gerrymandering, a practice described as follows:

> "Its origin has been described as follows: 'John Fiske in his Civil Government in the United States . . . . says that in 1812, when Gerry was governor of Massachusetts, the Democratic state legislature (In order, according to Winsor, to secure an increased representation of the Democratic party in the state senate) 'redistributed the districts in such wise that the shapes of the towns forming a single district in Essex county gave to the district a somewhat dragon-like contour. This was indicated upon a map of Massachusetts which Benjamin Russell, an ardent Federalist and editor of the Centinel, hung up over the desk in his office. The painter, Gilbert Stuart, coming into the office one day, and observing the uncouth figure, added with his pencil a head, wings, and claws, and exclaimed: "That will do for a salamander". "Better say a gerrymander", growled the editor; and the outlandish name, thus duly coined, soon came into general currency'." 2 A. L. R. 1337.

The Act was intended to prevent one of the great political parties from gaining an unconscienable advantage over another; was intended to prevent discrimination on account of race, color, or previous condition of servitude, and it is a matter of interest to note that the enactment of the Act, in its present form, followed the adoption of he Fifteenth Amendment to the Constitution of the United States.

In the Mississippi redistricting act, under review, there is no contention that the effect will be either to give one

political party an advantage over the other, or that it will in any manner discriminate against any race of people, on account of color, previous condition of servitude, or in any other way.

Since the power to determine the election and qualifications of its members is one for the House of Representatives, in the case of a wilful failure on the part of the state, in establishing Congressional districts, to observe the terms of the Act of Congress, to the extent that the spirit of the Act is violated, then Congress could resume its functions, and entertain a contest, and determine the right of the persons, claiming to be elected, to take their seats in the House of Representatives.

This further thought must be borne in mind—The Act of Congress requires that the district be compact, contiguous, and as nearly as practicable, of equal number of inhabitants.

In view of the fact that under the terms of the statute emphasis is laid upon the words "compact" and "contiguous" and they are given just as much importance as the provision in respect to the equality of number of inhabitants, we respectfully submit that taking the entire provision together, the same is hardly susceptible of judicial determination. In order to produce a compact, contiguous district it might be necessary to make the number of inhabitants inequal. Or, in order to make the districts equal as to number of inhabitants it might be necessary to destroy their compact contiguity. Your Honors must bear in mind that Congress probably considered that there were other things

which the state would have to take into consideration, than the mere question of a mathematically equal distribution of the inhabitants. The question of a Legislative redistricting act involves a great many considerations. There has to be taken into consideration the ethnology of the territory; the homogeneousness of the peoples; the commercial industries, and industrial activities of various parts of the state. Congress knew that the redistricting act would have to be passed by a state legislature, and by the use of the term "as near as practicable" it meant as nearly as was practicable by the use of legislative machinery.

The question which we have in mind was never presented with more clearness than by Mr. Justice Peckham of the Court of Appeals of New York, October 13, 1892, in the case of *People ex rel Carter v. Rice, Secretary of State*, 135 N. Y. 473, at page 498, 31 N. E. 921, at page 929.

There was involved in that case a state legislative apportionment act, and this distinguished jurist used the following language:

> "This renders the mathematical process impossible, both as regards senate districts and the apportionment of members of assembly. We start, then, with the proposition that to the legislature is intrusted some discretion in the matter of apportionment. Is the court to interfere with such power whenever it thinks that the legislature might possibly have come nearer to an equality, after complying with the special conditions mentioned in the constitution? This would be to assert a power in the court to supervise the exercise of the discretion granted to the legislature, if such

discretion were exercised in the slightest degree after the constitutional mandate in regard to county lines and county members had been complied with. We do not believe in the propriety or necessity of any such rule. On the contrary, we think that the courts have no power in such case to review the exercise of a discretion intrusted to the legislature by the constitution, unless it is plainly and grossly abused. The expression 'as nearly as may be', when used in the constitution with reference to this subject, does not mean as nearly as a mathematical process can be followed. It is a direction addressed to the legislature in the way of a general statement of the principles upon which the apportionment shall be made. The legislative purpose should be to make a district of an equal number of inhabitants as nearly as may be, and how far that may be carried out in actual practice must depend, generally, upon the integrity of the legislature. We do not intimate that in no case could the action of the legislature be reviewed by the courts. Cases may easily be imagined where the action of that body would be so gross a violation of the constitution that it could be seen that it had been entirely lost sight of, and an intentional disregard of its commands, both in the letter and in the spirit had been indulged in.

"In the report made to the Senate of the United States in April, 1832, by a committee of that body, of which Mr. Webster was chairman, it was stated that the words of the Federal Constitution were equivalent upon this subject to a direction to apportion the representatives among the states upon the basis of population, as nearly as may be. 3 Webst. Misc. Works, 369. It was then stated that the process theretofore adopted

by Congress was unconstitutional, and that the true process was a mathematical one, which the report set forth. It was not then adopted by Congress, which adhered to its old method. There is no intimation in the report that the action of Congress, although what was termed unconstitutional, was subject to the revision of the courts. No such remedy was ever suggested. Congress has since that time adopted the theory of the report, and made a mathematical problem of the subject, and referred it to the Secretary of the Interior to carry out its instructions on the basis of arithmetic.

"In this case mathematics cannot enter into the whole problem, because of the constitutional obligation as to county lines and county representation, and hence the sole question now is whether the legislative discretion has been so far abused as to render the act liable to an overthrow by the courts. This brings us to an examination of the act itself. It can be stated at the outset, that, although the fairest that has been passed upon the subject, the act is not an absolutely ideal one. *There are some inequalities which any one individual intrusted with the power might at once remedy, but which might be very hard to alter when brought under the review of* 128 *Assemblymen and* 32 *Senators. Local pride, commercial jealousy and rivalries, diverse interests among the people, together with a difference of views as to the true interests of the localities to be affected, all these things and many others might have weight among the representatives upon the question of apportionment, so that, in order to accomplish any result at all, compromise and conciliation would have to be exercised. Looking at*

the act as a result of such circumstances, and it seems clear that it cannot be said to be so far a violation of legislative discretion as to cause its complete overthrow by the courts."

So, we submit with respect to the Mississippi redistricting act, under review, the question is a Congressional-political question. Congress has treated its act as merely directory, and has left the question as an administrative matter to the states.

Adopting the reasoning of Mr. Justice Peckham, the act cannot be said to be an abuse of legislative discretion. As a matter of fact the legislative redistricting act under review is the most compact, contiguous act that the State of Mississippi ever had since the members of the House of Representatives have been elected by districts. A map of the Congressional districts, provided in the act under review, will reflect that they are doubtless approximately equal as to number of qualified electors. The Seventh District has a smaller population than the Third District. The Third District has a population of 420,069. The Seventh has a population of 416,301. The Seventh District has fewer native whites than the Sixth. The Sixth District has 198,832 native whites, while the Seventh has 174,597. The new Seventh District has less area than has been included in the Sixth District for thirty years. The new Seventh District has fewer counties than the Sixth. The new Seventh District is the most compact district in the state.

Under the recent act, the inequalities in population are

not greater than under previous redistricting acts in proportion to the population. As a matter of fact, the Legislature of the State of Mississippi, in 1932, practically returned to the redistricting act of 1880, under which act, with a total population in the state of 1,131,000, the districts varied from 125,860 in the Sixth District to 195,735 in the Fourth District, so that the inequalities following the census of 1880 were really greater than are to be found in the present bill.

The redistricting bill, passed by the Legislature of the State of Mississippi, in 1902, following the census of 1900, reflects the same inequalities. There were doubtless commercial and ethnological reasons for the present redistricting bill. The Third District, which is the largest district in the state, comprises what is known as the "Delta Section" of Mississippi, a part of Mississippi which is distinctive in soil, industry, etc., from every other part of the state.

The Sixth District represents the sea-coast, and the Long Leaf Yellow Pine Section of the state, and represents a different class of people, industries, etc.

The First District represents the prairie section of the state.

The new Seventh District represents the South-west portion of Mississippi, composed of homogeneous people, with congenial pursuits and industries.

We call Your Honors' attention to the language used

by the Supreme Court of the State of Mississippi, in the case of *Wood, Secretary of State v. State*, ex rel, 142 So. 747, at page 752. The Court used the following language:

> "For nearly one hundred years it has been the settled policy and practice to select Representatives in Congress from districts, and this has grown as a necessity out of the obvious fact that the different sections of the state have their own particular and peculiar interests and needs in national legislation and in national aid. This is strikingly illustrated in our own state by the Delta district wherein the paramount interest and need is in flood protection and in river matters, whereas the people in the north eastern district of the state have no immediate interest in those problems, except as all people in the entire nation are interested therein. * * * *
>
> "No complaint is urged against the redistricting act on account of contiguity or compactness, but the attack is because of inequality of inhabitants. It is shown that the districts in that respect are as follows: First District, 214,705; Second District, 219,661; Third District, 402,969; Fourth District, 184,266; Fifth District, 244,562; Sixth District, 284,547; Seventh District, 414,301. It is apparent upon the face of the stated figures that there is an inequality of inhabitants; but there has been an inequality in this respect in every congressional districting act that has been passed in this state, going back even to the beginning. And this has not been the case only in this state, but has prevailed in nearly all the states. * * These facts show that the matter of equality of inhabitants has by long and general practice been regarded both by the states and by Congress as a

subordinate or secondary question, and that the paramount and controlling consideration has been to create districts in which homegeneity in national interest and needs shall be preserved, rather than to be bound by a strict judicial rule of equality in number of inhabitants.

"We are not confronted here with a situation wherein there has been a mere pretense towards the creation of congressional districts, as would be the case for instance, if the Legislature had taken only one of two counties, or even three and made one congressional district of them, and so on for six districts, and had then placed the remainder of some fifty or sixty counties into a seventh district. This would be so far a mere pretense and fraud as to demonstrate that the paramount requirement of districts as substantial and homogeneous units had been utterly flouted and subverted. But here there has been the substantial creation of fairly compact and homogeneous districts, and while we regret the inequality of population, we must in approaching this question do so as judges, and not as legislators, nor as individuals, and in doing so we must broadly look to the whole state and to all its parts and sections and to the ultimate interests of all the people of the state who in the vast majority have had no direct part in, or connection with, this particular piece of legislation. We are thus confronted with the plain and obtrusive question whether by a mandate from this court, if such a mandate could be made effective, the districts and the district interests shall be allowed to be destroyed, the dominant practice and policy of nearly a century's duration shall be reversed, and in lieu thereof the Representatives shall be elected from the state at large

without regard to districts or the interests of the people of the state in the preservation of district representation."

Respectfully submitted.

GREEK L. RICE, Attorney General, and

J. A. LAUDERDALE, Assistant Attorney General

WILLIAM H. WATKINS,

Attorneys for Appellants.

APPENDIX A

DISSENTING OPINION BY JUDGE HOLMES

The final decree in this case is broad in terms and far-reaching in effect. It expressly declares void an entire act of the Legislature and perpetually enjoins the Governor, as well as all subordinate officers, from executing its provisions. It indirectly strikes at nominations by political parties, although it was stated in open court that no interference with party primaries was asked by the plaintiff; but I shall not dwell upon this seemingly apparent error in the decree, as the objections to it are more deeply rooted. However, see Section 5870 and 5900 Miss. Code of 1930; *Newverry vs. United States*, 256 U. S. 232.

It was conceded at the hearing, and the court judicially knows, that the elections sought to be regulated are regular ones provided by law to choose officers, both state and federal, in addition to representatives in Congress, and that the expense of adding the names of congressional candidates to the ballot is too trifling for this or any court to consider. It was further conceded at the bar that the right of the plaintiff to be a candidate for office was not a sufficient legal basis for the issuance of an injunction.

Reliance for jurisdiction in this court is had solely upon Sec. 24, Par. 14, of the Judicial Code. Regardless of the amount in controversy, this paragraph gives the court jurisdiction of "all suits at law or in equity authorized by law to be brought by any person to redress the deprivation,

under color of any law, * * * of any right, privilege, or immunity secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

It is not conceivable that Congress intended by this paragraph to change the well settled rule that a court of equity is concerned only with matters of property and the maintenance of civil rights. The grant of jurisdiction of "suits at law or in equity authorized by law to be brought" signifies an intention to preserve, and not to obliterate, the historical distinctions between law and equity embedded in the federal constitution, and recognized in federal jurispudence from the national government's birth to the present time. This court has no jurisdiction in matters of a political nature, except when necessary to the protection of rights of property. "Neither the legislative nor executive department," said Chief Justice Chase, "can be restrained in its action by the judicial department, though the acts of both, when performed, are, in proper cases, subject to its cognizance." *Mississippi v. Johnson,* 4 Wall 475. "The office and jurisdiction of a court of equity," said Mr. Justice Gray, "unless enlarged by express statute, are limited to the protection of rights of property." *In re Sawyer,* 124 U. S. 200. Mr Chief Justice Fuller, on circuit, quoting the preceding excerpts and citing the other cases, added: "To assume jurisdiction to control the exercise of political powers, or to protect the purely political rights of individuals, would be to invade the domain of the other departments of government or of the courts of common law."

Green v. Mills, 69 Fed. 852. See, also, *Giles v. Harris*, 189 U. S. 475, 47 L. ed. 909; *Brumfield v. Brock*, 142 So. 745; Pomeroy's Equity Jurisprudence, Vol. 4, (14 ed.) Sec. 1753.

Questions of equitable jurisdiction and procedure aside, the claim in this case is lacking in matter of substantial federal right. The crux of plaintiff's contention is that the right to vote implies the right to vote in a legal election where his ballot will count for as much, relatively, as the ballot of any other elector, and that Mississippi's recent redistricting act, by inequality in number of inhabitants, lessens the weight of his vote in comparison with the vote of electors in other congressional districts with fewer inhabitants. No denial of the right to vote or hold office is asserted. No property or civil right is denied or threatened. The federal implied right, which is asserted, is that the vote of every person in the seventh district shall be of equal weight or power with the vote of every elector in other districts.

With deference, it is thought that the conclusion of the court is predicated upon a false major premise. The equal protection clause of the fourteenth amendment is inapplicable. No statutory or constitutional provision gives any elector the right to vote in a district numerically equal in inhabitants to every other congressional district. Mathematical equality is not required. Numerically exact limits are not fixed, either in the constitution or by act of Congress. The widest discretion has been exercised by the legislatures, under the present and previous apportionments, without congressional interference. Under the one of 1930, there are many states with unequal districts, as to

the number of inhabitants. The State of Alabama has one with 250,000 inhabitants, and another with 450,000; California one with 165,000 and another with 350,000; Michigan one with 225,000 and another with 400,000; Ohio one with 168,281, another with 633,678; Pennsylvania one with 125,322, another with 445,109; South Dakota one with 200,000, another with 650,000; Tennessee one with 195,000, another with 380,000. If, as plaintiff claims, he has a federal right to a balancing vote throughout the United States, it is apparent that this Court can grant him no effective relief. For this reason, the Constitution gave plenary powers to regulate the subject to the Legislature of each state and to the Congress.

There is also a wide gulf between the facts alleged and the rights asserted. The bill relies upon the number of inhabitants in each district; nothing is said about the number of qualified electors. This is natural because the basis of representation in the Congress is apportioned by the Constitution in accordance with the number of inhabitants in each state. It is well known that in many of the states, including this one, residence is not the sole qualification of an elector. The proportion of electors to inhabitants is a factual relation, depending upon varying conditions, of which a court cannot take judicial knowledge. Notwithstanding the excessive number of inhabitants, the plaintiff's vote, under his theory, may outweigh the vote of electors in other districts with fewer inhabitants. It is a non-sequitur, to conclude that the number of qualified electors in each district is in equal proportion to the number of inhabitants. If then the asserted right existed in the abstract, no facts are shown which would give play to the exercise of it.

The objections to the decree are still more serious. To issue an injunction to restrain the holding of an election, or directing the mode in which it should be held, has ever been regarded by profound constitutional writers as an interference with a free expression of opinion, and an unwarranted obstruction to the freedom of elections, which, if successful, would be fraught with danger to our republican institutions. The mere effort to assume such a power is suggestive of a tendency to render the people and the officers subservient to the courts, in matters of civil polity and endangers our dual form of state and national government, each with its separate and independent departments.

The relief asked should be denied, not that the redistricting act is deemed wise, or that all of the regulations prescribed by Congress have been fairly met, but because, under the distribution of powers in the federal constitution, the judicial department is not the guardian of the rights of the people in respect to the times, places and manner of holding elections for Representatives in the Congress. The Constitution says these things "shall be prescribed in each state by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators." If a primary object of the act is evinced by the mandate that "the Representatives to Congress shall be elected by districts composed of contiguous and compact territory," each with only one representative, such object should not be wholly defeated because the Legislature may have abused its discretion with reference to a standard which is plainly directory, as shown by the use of the words, "as nearly as practicable." The discretion was not given to the judiciary. A court can only

efface the districts, but Congress may alter the boundaries, or regulate more in detail the number of inhabitants, if not retroactively, at least prospectively.

The rule is well settled that, except where the Constitution has imposed limits upon the legislative power, it must be considered as practically absolute. Judge Cooley says:

> "The protection aginst unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fails, the people in their soverign capacity can correct the evil; but courts cannot assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the Constitution. It cannot run a race of opinion upon points or right, reason and expediency with the law-making power. Any legislative act which does not encroach upon the power apportioned to the other departments, being prima facie valid, must be enforced, unless restrictions upon the legislative authority can be pointed out in the Constitution, and the case shown to come within them."

If it be contended that, as a citizen or an elector of the State, the plaintiff has a federal right to insist upon a compliance by the Legislature with the Congressional reapportionment act, it becomes readily apparent that in either capacity he has sustained no injury which has not been suffered by the people or the electorate at large. If any wrong has been done by the Legislature, it is a public, political wrong, from which no special injury has resulted,

or is impendent to the plaintiff, and for which equity will grant no injunctive relief.

In conclusion, I am constrained to dissent from the action of the majority of the court, because I regard the issuance of the injunction in this case as an unwarranted encroachment by the federal court upon the legislative discretion of a sovereign state, the necessary effect of which is to substitute the judgment of the court for that of the Legislature, in a matter where the Federal constitution has granted an exclusive discretion, primarily to the Legislature of each state and ultimately to the Congress of the United States. Operating in this instance directly upon the primary function of the Legislature, if successful, the injunction portends the possibility of a like encroachment upon the ultimate, or a similar, function granted to the Congress by the Constitution of the United States.

APPENDIX "B"

POPULATION OF CONGRESSIONAL DISTRICTS OF MISSISSIPPI, AS CREATED BY CHAPTER 61, LAWS OF MISSISSIPPI 1902, AND HOUSE BILL 197 LAWS OF 1932.

	CENSUS 1900 LAWS 1902	CENSUS 1930 LAWS 1932
FIRST DISTRICT	187,739	223,674
SECOND DISTRICT	183,825	201,911
THIRD DISTRICT	232,174	420,969
FOURTH DISTRICT	199,650	198,708
FIFTH DISTRICT	183,066	244,904
SIXTH DISTRICT	162,440	305,354
SEVENTH DISTRICT	211,521	414,301

OCT 24 1932

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932

No. 424

WALKER WOOD, SECRETARY OF STATE, ET AL.,
APPELLANTS,

vs.

S. C. BROOM, APPELLEE.

Congressional Report, Davison vs. Gilbert.

APPENDIX 1 OF APPELLANTS' BRIEF.

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APPENDIX A.

HOUSE OF REPRESENTATIVES.

56th Congress, 2nd Session. — Report No. 3000.

Congress sustained this report.

DAVISION VS. GILBERT.

March 1, 1901.—Ordered to be printed.

Mr. TAYLER, of Ohio, from the Committeee on Elections No. 1, submitted the following

REPORT.

(To accompany H. Res. 443.)

The Committee on Elections No. 1, to whom was referred the contested-election case of George M. Davison v. George G. Gilbert, from the Eighth district of Kentucky, make the following report:

The contestee was elected, as shown by the official returns, by a plurality of 841.

The claim of the contestant chiefly rests upon the fact that on March 11, 1898, an act was passed by the legislature changing the boundaries of the Eighth and Eleventh Congressional districts of Kentucky, whereby the county of Jackson was taken from the Eighth District and added to the Eleventh. Jackson County having a large Republican majority, the effect of its transfer to the Eleventh was to change the Eighth from a district which had immediately previously been Republican into a Democratic district.

As respects this act, the contestant claimed three things:

First, that it was contrary to the constitution of the State of Kentucky;

Second, that it was never properly passed by the legislature in the manner required by the Kentucky constitution;

Third, that it was contrary to the act of Congress apportioning Representatives among the States.

As to the first two propositions your committee has no difficulty in arriving at the conclusion that the act of March 11, 1898, was not in contravention of the Kentucky constitution, and that it was, as far as we have authority to inquire, properly passed by the legislature.

The third proposition, namely, that it contravenes the act of Congress, is more serious, and requires more careful consideration.

The Federal Constitution, Article I, section 4, paragraph 1, is as follows:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such regulations, except as to the Places of Choosing Senators.

This provision of the Constitution has been very much discussed; first, as to the scope of the power granted to Congress respecting the manner of holding Congressional elections; and, second, as to the expediency of the exercise of such power where it was sought to be exercised, if possessed, for the purpose of controlling the division of a State into Congressional districts.

It is believed that this is the first time in the history of the Government when Congress has been called upon to undo the work of a State which had divided itself into the proper number of Congressional districts.

When the Constitution was under consideration by the various States several of them opposed the unqualified acceptance of the provision above quoted, on the express ground that the clause was liable to misconstruction and that under its terms Congress might at some time seek to divide the States into districts,

and in several States the ratifying body accepted the Constitution on condition that effort should be made to change the phraseology so as to put this matter beyond dispute. For nearly forty years the States proceeded to elect Representatives, some at large and some by districts. In 1840 the policy of electing by districts was generally approved and adopted, but several of the States continued to elect their Representatives by the vote of the entire State. The first legislation on the subject going beyond the mere apportionment of the States was enacted in 1842. In the apportionment act of that year an amendment was added in the House providing for the division of the several States into districts, composed of contiguous territory, equal in number to the number of Representatives to which the State was entitled, and each district to elect one Representative and no more.

The amendment provoked considerable discussion, but was finally adopted.

The apportionment act based upon the census of 1850 made no provision for the division of States into districts, nor did the act of 1862. The act of February 2, 1872, provided that Representatives should be elected by districts composed of contiguous territory, and added the provision "containing, as nearly as practicable, an equal number of inhabitants." The same provision appears in the apportionment acts of 1882 and 1891.

So far as legislative declaration is concerned, it is apparent that Congress has expressed an opinion in favor of its power to require that the States shall be divided into districts composed of contiguous territory, and of as nearly equal population as practicable. Whether it has the constitutional right to enact such legislation is a very serious question, and the uniform current of opinion is that if it has such power under the Constitution, that power ought never to be exercised to the extent of declaring a right to divide the

State into Congressional districts, or to supervise or change any districting which the State may provide.

The best opinion seems to be that the Constitution does not mean that under all circumstances Congress shall have power to divide the States into districts, but only that the constitutional provision was inserted for the purpose of giving Congress the power to provide the means whereby a State should be represented in Congress when the State itself, for some reason, has failed or refused to make such provision itself.

Justice Story, in his commentaries on the Constitution, says:

> In answer to all such reasoning it was urged that there was not a single article in the whole system more completely defensible. Its propriety rested upon this plain proposition, that every government ought to contain within itself the means of its own preservation. A discretionary power over elections must be vested somewhere. There seems to be but three ways in which it could be reasonably organized. It might be lodged either wholly in the National Legislature, or wholly in the State Legislatures, or primarily in the latter and ultimately in the former. The last was the mode adopted by the convention. The regulation of elections is submitted in the first instance to the local government, which in ordinary cases, and when no improper views prevail, may both conveniently and satisfactorily be by them exercised; but in extraordinary circumstances the power is reserved to the National Government, so that it may not be abused, and thus hazard the safety and permanency of the Union.

He adds: "It is not too much, therefore, to presume that it will not be resorted to by Congress until there

has been some extraordinary abuse or danger in leaving it to the discretion of the States respectively."

Hamilton, in the Federalist, makes this, among other comments, on the subject:

> Nothing can be more evident that that an exclusive power of regulating elections for the National Government in the hands of the State legislatures would leave the existence of the Union entirely at their mercy. They could at any moment annihilate it by neglecting to provide for the choice of persons to administer its affairs.

Madison expressed the same views in the Virginia convention with great force, and expressed the opinion that if the elections were exclusively under the control of the State government the General Government might easily be dissolved.

Chancellor Kent, in his Commentaries, says:

> The legislature of each State prescribes the times, places, and manner of holding elections, subject, however, to the interference and control of Congress, which has permitted them for the sake of their own preservation, and which it is to be presumed they will never be disposed to exercise except when any State shall neglect or refuse to make adequate provision for the purpose.

In the Twenty-second Congress, first session, an elaborate report was presented by Mr. Webster on the subject of apportionment. In the course of this exhaustive statement he discusses the very question which is here involved. The following extract is fairly representative of the rest of the report on that phase of the question:

> Whether the subdivision of the representative power within any State, if there be a subdivision, be equal or unequal, or fairly or unfairly made, Congress can not know and has no authority to inquire. It is enough that the State presents her own representation on the floor of Congress in the mode she chooses to present it. If a State were to give to one portion of her territory a representative for every 25,000 persons, and to the rest a representative only for every 50,000, it would be an act of unjust legislation, doubtless, but it would be wholly beyond redress by any power in Congress, because the Constitution has left all this to the State itself.

These are the guarded words of a great commentator on the Constitution, uninfluenced by any bias or special motive, except to justly interpret its provisions.

A remarkable and convincing speech is that made in the 27th Congress by Nathan Clifford, then a Representative from Maine and afterwards a justice of the Supreme Court of the United States. Mr. Clifford argued with great cogency against the theory that Congress had any such power as the act of 1842 undertook to express, and in our opinion those arguments have never been satisfactorily answered.

And, indeed, the force which the proposition contended for by the contestant in this case possesses is derived chiefly from the fact that, without objection for the last three decades, Congress has legislated as though no question was made as to its power over the division of States into districts. If the act of 1842, in which we find the first Congressional expression of power, had sought by its terms to define the geographical boundaries of every Congressional district in the several States it could not by any possibility

have been adopted. So far as we have been able to learn, no friend of the amendment to that act contended that Congress had any such power. The construction of Madison, Story, and Kent seems most reasonable and natural.

Your committee are therefore of opinion that a proper construction of the Constitution does not warrant the conclusion that by that instrument Congress is clothed with power to determine the boundaries of Congressional districts, or to revise the acts of a State legislature in fixing such boundaries; and your committee is further of opinion that even if such power is to be implied from the language of the Constitution, it would be in the last degree unwise and intolerable that it should exercise it. To do so would be to put into the hands of Congress the ability to disfranchise, in effect, a large body of the electors. It would give Congress the power to apply to all the States, in favor of one party, a general system of gerrymandering. It is true that the same method is to a large degree resorted to by the several States, but the division of political power is so general and diverse that notwithstanding the inherent vice of the system of gerrymandering, some kind of equality of distribution results.

Your committee therefore recommends the adoption of the following resolutions:

Resolved, That George M. Davison was not elected a Representative to the Fifty-sixth Congress from the Eighth District of Kentucky, and is not entitled to a seat therein.

Resolved, That George G. Gilbert was elected a Representative to the Fifty-sixth Congress from the Eighth District of Kentucky, and is entitled to retain his seat therein.

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 424

WALKER WOOD, SECRETARY OF STATE, ET AL.,
APPELLANTS,

vs.

S. C. BROOM, APPELLEE.

REPLY BRIEF FOR APPELLANTS.

GREEK L. RICE,
Attorney General;
J. A. LAUDERDALE,
Assistant Attorney General;
WILLIAM H. WATKINS,
Attorneys for Appellants.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 424

WALKER WOOD, SECRETARY OF STATE, ET AL., APPELLANTS,

vs.

S. C. BROOM, APPELLEE.

REPLY BRIEF FOR APPELLANTS.

The question involved is a political one. The question involved in this case is not appellee's right to vote for candidates for the House of Representatives nor neither does it involve his right to become such a candidate himself. He may exercise either or both rights. He asserts the right, however, to become a candidate for Congress on a state-wide instead of a district ticket. He asserts the right to vote for candidates for the House of Representatives running on a state-wide and not a district ticket by reason of an injunction issued from the Equity side of the District Court of the United States in the court below. Such election is now being conducted in accordance with appellee's contention.

Appellee's counsel cite no cases holding that this suit is a judicial and not a political question. The

cases cited divide themselves into two classes. *Nixon* v. *Herndon,* 273 U. S. 536, and *Wiley* v. *Sinkler,* 179 U. S. 58, 45 L. Ed. 84, cases where there was a deprivation of the plaintiff's right under the Constitution and the Acts of Congress to vote for a member of Congress and this Court held that an action at law for damages was maintainable. The second class of cases cited by appellee's counsel is *Ex parte Siebold,* 100 U. S. 371; *Ex parte Yarbrough,* 110 U. S. 651; *United States* v. *Moseley,* 238 U. S. 383, each of which were cases where the defendants were indicted for violating the Act of Congress prohibiting persons from conspiring together to deprive any person of any of the rights, privileges or immunities granted under the Constitution of the United States. Nor neither does the case of *Smiley* v. *Holm,* 285 U. S. 355, support appellee's contention. In that case which was an appeal from an action of mandamus from the Supreme Court of Minnesota this Court held that the State of Minnesota had not adopted any Congressional redistricting act whatsoever and that such an act cannot become a law without the signature of the Governor of the State. Nor neither does the case of *Moran* v. *Bowley,* 179 N. E. 536, support appellee's contention. The Supreme Court of Illinois held that in view of the fact that public moneys were about to be expended for the payment of which the complaining party would be subject to taxation that the suit was maintainable in Equity and upon the judicial nature of the controversy the Supreme Court of Illinois held that irrespective of the Act of Congress under its own Constitution equality of representation

was required and that such right was invaded in the particular case.

We call your Honors' attention to the case of *Brumfield* v. *Brock,* 142 So. 745, where the Supreme Court of Mississippi affirmed that such a controversy was political and not judicial in character; that the plaintiff had no property rights involved for that elections would have to be held regardless on account of the necessity for electing other persons and that the amount imposed upon the complaining party was so small as not to justify a Court of Equity in taking jurisdiction. The reasoning in that case as well as the facts stated are applicable to the present controversy.

Counsel for the appellee, however, seek to justify the jurisdiction of the Court by reference to the 14th paragraph, Section 41, Title 28 of the U. S. C. A., defining the jurisdiction of Federal Courts. The following language is used, "of all suits at law or in Equity authorized by law to be brought, etc.," from which it would appear that the Act of Congress was to confer no new jurisdiction either at law or Equity. The suit in order to be brought in Equity must be one authorized to be brought and the only suits mantainable in a Federal Court of Equity under the Constitution of the United States are such as were had under the Equity system prevailing in England at the time of the adoption of the Constitution of the United States.

Counsel, however, contend that the appellee was without an adequate remedy at law and therefore a Federal Court of Equity should take jurisdiction on the principle that Equity will afford a remedy where

the remedy at law is inadequate. However, in cases of a political nature as will appear from the many cases cited in our original brief a Court of Equity affords no remedy. The remedies provided are (*a*) an adequate remedy at law, (*b*) a legislative remedy, and (*c*) the right of appeal to the electorate. Appellee has the right to vote for Congressmen, there is no discrimination on account of race or color, therefore no civil right guaranteed by the Constitution is involved.

We will not attempt to distinguish the several citations from State Courts. The Supreme Court of each State is the final judge of the jurisdiction which it will exercise and as to whether or not the controversy involves a property right or is political in nature. In many States, however, all distinctions between law and equity have been abolished so that it would not be helpful to the court to attempt to distinguish these cases. The following cases, however, are a few out of a very large number which hold that the matter of redistricting a State is an administrative matter peculiarly within the jurisdiction of the State Legislature. The right of courts to inquire into the same in many cases denied and in others the courts hold that the act of the Ligislature in redistricting a State is conclusive except in instances of flagrant abuse. *State ex rel. Meighen* v. *Weatherill,* 125 Minn. 336; *People ex rel. Carter* v. *Rice,* 135 N. Y. 473; *People ex rel. Woodyatt* v. *Thompson,* 155 Ill. 451; *In Re Baird,* 142 N. Y. 523; *State ex rel. Warson* v. *Howel,* 92 Wash. 540; *Wise* v. *Bigger,* 79 Va. 269, and *Richardson* v. *McChesney,* 128 Ky. 363, 108 S. W. 322, 129 A. S. R. 299.

Rights Asserted under the 14th Amendment to the Constitution of the United States.

We understand from the brief prepared by appellee's counsel that no longer is any insistence had of the fact that the appellee and other persons similarly situated are taxpayers. There is no longer any contention made that in cases of $3,000 is involved. The appellee does not any longer contend that he has the right under the injunction granted to be or become a candidate for the House of Representatives. As we understand appellee's brief, while it asserts that the redistricting act passed by the legislature of the State of Mississippi complained of, violates the Act of Congress, that the appellee bases his right to equitable relief upon the 14th Amendment to the Constitution of the United States, the appellee's claim being as we gather the same from the argument contained in the brief, that under the 14th Amendment to the Constitution of the United States appellee and other persons, whether registered voters or not, are, under the 14th Amendment to the Constitution of the United States, entitled to equal representation in the House of Representatives and that owing to the alleged inequality of the Districts created by the Legislature of Mississippi, 1932, the appellee and other persons are denied rights and immunities claimed under the 14th Amendment to the Constitution of the United States.

At the outset, we would call the attention of the court to the fact that the appellee is a registered voter and no other person has joined in the bill other than himself. Therefore the appellee can only present the question as to whether or not as a qualified elector

having the right to vote, the redistricting act of the State of Mississippi violates the 14th Amendment to the Constitution of the United States. The appellee cannot present the rights of persons in a different class from himself. See the case of *McCabe* v. *Railway Co.*, 235 U. S. 151; *Little* v. *Tanner*, 208 Fed. 605 (Rev. other grounds, 240 U. S. 369). The original bill of complaint does not allege and the appellee has not contended that as to qualified voters and electors there is discrimination or any lack of equality. Be that as it may, however, we respectfully submit that the right of a qualified elector or the inhabitant of a Congressional District in a State is not entitled under the 14th Amendment to the Constitution of the United States to equality in representation with other Districts throughout the State. No case is cited by appellee's counsel to the effect that the 14th Amendment to the Constitution of the United States of itself requires that Congressional Redistricting Acts of a State be equal as to inhabitants unless it be the three-judge Kentucky case, which decision cites no authoritative cases in support of the enunciation. It is, of course, elementary that since the appellee has brought his suit before a three-judge District Court of the United States the jurisdiction must rest upon the unconstitutionality of a State statute and not the alleged violation by the State statute of a Federal Statute.

There is a complete compliance with the 14th Amendment to the Constitution of the United States where there exists no inequality as to residence of the separate districts. The following cases are directly in point. *Bowman* v. *Lewis*, 101 U. S. 22; *Hayes* v.

Missouri, 120 U .S. 71; *McPherson* v. *Blacker*, 146 U. S. 1; *Martin Ocampo* v. *United States*, 234 U. S. 91, wherein the following language was used:

> "It is contended that since Act No. 612 denies to the inhabitants of Manila the right to a preliminary examination which is accorded to all other people in the Islands, it denies the equal protection of the laws guaranteed by the Act of Congress. But it was long ago decided that this guaranty does not require territorial uniformity. In *Missouri* v. *Lewis* (*Bowman* v. *Lewis*), 101 U. S. 22, 30, 25 L. Ed. 989, 992, this Court (by Mr. Justice Bradley) said:
>
> "'The last restriction of the Fourteenth Amendment as to the equal protection of the laws, is not violated by any diversity in the jurisdiction of the several courts as to subject-matter, amount or finality of decision, if all persons within the territorial limits of their respective jurisdictions have an equal right, in like cases and under like circumstances, to resort to them for redress. Each State has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local Government. As respects the administration of justice, it may establish one system of courts for cities and another for rural districts, one system for one portion of its territory and another system for another portion. Convenience, if not necessity, often requires this to be done, and it would seriously interfere with the power of a State to regulate its internal affairs to deny to it this right. We think it is not denied or taken away by anything in the Constitution of the United States, including the Amendments thereto.'
>
> "And see *Hayes* v. *Missouri*, 120 U. S. 68, 72, 30 L. Ed. 578, 580, 7 S. Ct. Rep. 350; *Chappell*

Chem. & Fert. Co. v. *Sulphur Mines Co.*, 172 U. S. 474, 43 L. Ed. 520, 19 S. Ct. 268; *Mallett* v. *North Carolina*, 181 U. S. 589, 598, 45 L. Ed. 1015, 1020, 21 S. Ct. Rep. 730, 15 Am. Crim. Rep. 241."

See also case of *Ohio ex rel.* v. *Akron Metrop. Park District*, 281 U. S. 74.

We respectfully submit however that where a State has been redistricted by act of the Legislature of the State that equality in inhabitants is not required by the 14th Amendment to the Constitution of the United Sates. Supposing that Congress had made no decennial reapportionment following the 1930 Census. Owing to the increase in population inequality would exist in some of the Districts. The court would be without power to compel Congress to reapportion the States on the basis of representatives if the position of the appellee be correct. Then if an existing State redistricting law by reason of the failure of Congress to act and by reason of increasing population brought about unequal representation, the then existing redistricting Act would violate the 14th Amendment to the Constitution of the United States. We respectfully submit that the position is not sound.

Respectfully submitted,

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No. 424

In the Supreme Court of the United States

OCTOBER TERM, 1932

WALKER WOOD, SECRETARY OF STATE, OF STATE OF MISSISSIPPI, Appellant

vs.

STEWART C. BROOM, Appellee

BRIEF FOR APPELLEE

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In the Supreme Court of the United States

OCTOBER TERM, 1932

No.....

WALKER WOOD, SECRETARY OF STATE, OF STATE OF MISSISSIPPI, Appellant

vs.

STEWART C. BROOM, Appellee

BRIEF FOR APPELLEE

STATEMENT OF CASE

This is a suit by the appellee, based on the 14th clause of *Section* 41, of *Title* 28, of the *United States Code Annotated,* which provides that this Honorable Court shall have jurisdiction; "Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation under color of any law, statute, ordinance, regulation, custom, or usage of any state, of any right, privilege or immunity secured by the Constitution of the United States, or any right secured by any law of the United States, providing for equal rights of citizens of the United States or of all persons within the jurisdiction of the United States."

And as to the Appellee in this case the jurisdiction of this Honorable Court is placed squarely on this Conference of jurisdictional power. The bill seeks to have this court declare the act of the Legislature of the State of Mississippi, known as Chapter 197, Laws of 1932, known

as the Redistricting Bill, redistricting the State of Mississippi into seven congressional districts, void and invalid, as being in violation of Article 1, Section 4 of the Constitution, the Fourteenth Amendment thereof, and the Act of Congress of August 8, 1911, and of Section 3 of Chapter 5 thereof, reading as follows: "*In each state entitled under this apportionment to more than one representative, the representative to Congress shall be elected by districts composed of a contiguous and compact territory and containing as near as practicable an equal number of inhabitants.. The said districts shall be equal to the number of representatives to which such state may be entitled in Congress, no district electing more than one representative.*" And the Mississippi redistricting act being in violation of the Federal statute and Constitution deprives the appellee of the fundamental guaranteed rights of equality of representation among the citizens and inhabitants of Mississippi and other citizens and inhabitants of the United States in the national Congress, and of his civil right as guaranteed by the law and Constitution.

The Mississippi redistricting act denies equal representation and does not arrange the congressional districts compactly, contiguously and of as nearly equal number inhabitants as practicable, and appellee therefore denies its validity.

STATEMENT OF FACTS

Under the old census Mississippi was allotted eight congressmen. Under the last census it was allotted seven. It, therefore, became necessary that the State of Mississippi be divided into seven congressional districts instead of eight.

At the 1932 session, the State Legislature, as charged in the bill, and admitted by the answer, used no discretion or judgment in redistricting said State, and passed what is known as House Bill 197, under which, as set out in the bill herein filed, the populations of the various districts

ranged from 184,266 in the Fourth District to 416,301 in the Seventh District. The population of the various Districts as fixed by House Bill 197 being:

First District	241,605
Second District	219,661
Third District	420,969
Fourth District	184,266
Fifth District	244,562
Sixth District	284,457
Seventh District	416,301

The Third and Fourth Ditricts contain 42 per cent of the total population of the State and the other five Districts contain 58 per cent of the total population.

Appellee is a citizen of the Seventh District.

The total population of the State is 2,011,781 and the proper ratio between the several Districts is 287,397.

The Seventh District has 128,904 more than its ratio.

The Third District has 133,572 more than its ratio.

The First District has 45,974 less than its ratio.

The Second District has 67,736 less than its ratio.

The Fourth District has 103,171 less than its ratio.

The Fifth District has 42,835 less than its ratio.

The Sixth District has 2,940 less than its ratio.

No District under the new Mississippi redistricting act is composed of less than ten counties.

All the allegations in the bill of complaint are admitted by the answer filed.

The bill charges that the State of Mississippi is an agricultural state, comparatively level, with no natural obstructions or barriers, and that it is easily susceptible to division into seven contiguous and compact districts of a practically equal number of inhabitants. The bill and exhibits show the counties composing the various districts and the population thereof and the glaring injustice and inequality as between the districts is shown by the bill and exhibits.

In the hearing in the lower court it was admitted by appellants that the act of the Legislature of Mississippi did not conform to the requirements of the Act of Congress of August 8, 1911, and Article 1, Section 4 of the Constitution, as well as the Fourteenth Amendment to the Constitution, but appellant contended that it was a political and not a judicial question and Equity was powerless to grant relief.

We have nat seen appellant's brief, but we presume that it will be admitted in this court, as it was in argument in the lower court, that the Act of Congress of August 8, 1911, is constitutional and is the controlling law on the question.

An examination of the bill and exhibits will show that the act of the Mississippi Legislature in redistricting Mississippi violated two of the vital provisions of the Act of Congress above mentioned, in that (1) it did not regard the mandate for compactness, and (2) it disregarded the mandate for equality of population. And, as hereinbefore stated, it was admitted in the lower court that the said act of the Mississippi Legislature was invalid for these reasons.

On these facts the complainant and appellee seeks protection in the Federal Court of the right of equal representation guaranteed to him by the Constitution of the United States and the Act of Congress hereinbefore quoted.

LEGAL ISSUES

On the facts above stated, the following legal issues are presented:

(1) This is a judicial and not a political question, and complainant has the right to maintain this suit.

(2) Appellee having no adequate remedy at law in the Federal Court, a court of equity is the only court that can afford relief under the unconstitutionality of the said statute and protect the appellee's civil rights.

ARGUMENT

POINT I. JUDICIAL AND NOT POLITICAL QUESTION

We are concerned about the election of officers under the Federal Constitution and the Federal Statute for the election of members of the Federal Congress, and to say that this court has no jurisdiction of the matters laid in the bill is tantamount to saying that the State can with impunity deprive the citizens of an inherent civil property and constitutional right for a period of ten years and leave them stranded without remedy or relief.

In *Ragland v. Anderson,* 128 Am. St. Rep. 242 (Ky.), 125 Ky. 141; 100 S. W. 865, the court says: "Whenever a statute redistricting a state into districts makes the division so unequal as to violate the constitutional provision that such a division must be in proportion to the population is not so essentially a political question as to be beyond the jurisdiction of the court."

See also *Nixon v. Herndon,* 273 U. S. 536; 71 L. Ed 759.

In *Moran v. Bowley,* 179, N.E. 526, January, 1932, 347 Illinois 148, the court said: "The allegation of a bill to have a redistricting act declared unconstitutional and enjoin officers from expending public funds in carrying out

the provisions, held sufficient to constitute a taxpayers bill to enjoin misappropriation of public funds."

"Equity exercises jurisdiction at suits of taxpayers to enjoin public officers from unauthorized appropriations of public funds derived from taxation."

"*State Legislature in remapping state for congressional purposes must substantially comply with provisions of federal statutes* (2USCA, Sec. 2a and Secs. 2, 2 note, 3-5)."

"*Congressional apportionment cannot be sustained when voter in one district is given vastly more power than is given to voter in another district, especially where inequality extends to many districts* (2 USCA Sec. 2a, and Secs. 2, 2 note, 3-5)."

"*Legislature cannot in apportioning state for election of representatives to Congress pass laws effectually tending to disfranchise large number of voters.*" *Moran v. Bowley,* supra.

We submit that when under the present Mississippi act 416,301 inhabitants of the Seventh Congressional District have but one Congressman, and the 184,266 inhabitants of the Fourth Congressional District have a Congressman, that then the inhabitants of the Seventh Congressional District for all practical purposes are disinfranchised to the extent of more than fifty per cent, as compared with the Fourth Congressional District inhabitants.

In *Smiley v. Holm,* 76 L. Ed., p ....., Adv. Ops. 1931-1932, p. 600, it was held: "If there is no valid act to redistrict a state under the rules laid down by section 3, where there is a decrease in representatives, the election must be held from the state-at-large." Section 6277 of the Mississippi Code Annotated, 1930, is substantially as above, and concludes that, "If the number of representatives shall be diminished then the whole number shall be chosen by the electors of the state at large."

In the case of *Smiley v. Holm,* supra, this court further held as follows: "It follows that in such a case, unless and until new districts are created, all representatives allotted to the state must be elected from the state-at-large. That would be required in the absence of a redistricting act, in order to afford the representation to which a state is constitutionally entitled, and the general provisions of the act of 1911 cannot be regarded as intended to have a different import."

It must follow that as the act is conceded to be unconstitutional and Mississippi now has no congressional districts, there can be no nomination or election of Congressmen from imaginary districts.

With every power as extended by Congress to the states for redistricting purposes, *Congress reserves the right to supplement such regulations, substitute its own, impose additional penalties for violation of state laws. It has a general supervisory power over the whole subject, and in so doing Congress is making laws to be enforced by the people or by the courts and are not passing political resolutions.*

Ex parte *Siebold,* 100 U. S. 371, 25 L. Ed. 717; Ex parte *Yarbrough,* 110 U. S. 651, 28 L. Ed. 274; *U. S. v. Mosley,* 238 U. S. 383, 59 L. Ed. 1355; *Newberry v. U. S.,* 65 L. Ed. 913; *Smiley v. Holm,* supra; *Koenig v. Flynn,* 76 L. Ed., Adv. Ops. 1931-1932, p. 608, and *Carroll v. Becker,* 76 L. Ed. Adv. Ops. 1931-1932, p. 609; *Parker v. State,* 133 Ind. 178, 32 N. E. 119, 18 L. R. A. 567; *Ragland v. Anderson,* 125 Ky. 141, 100 S. W. 865, 128 Am. St. Rep. 242; *People v. Rice,* 135 N. Y. 473, 31 N. E. 921, 16 L. R. A. 836; *Harmisson v. Jefferson County,* 45 W. Va. 179, 31 S. E. 394, 42 L. R. A. 591; *State v. Cunningham,* 83 Wis. 90, 53 N. W. 35, 35 Am. St. Rep. 27, 17 L. R. A. 145; *Fletcher v. Tuttle,* 151 Ill. 41, 37 N. E. 683, 32 Am. St. Rep. 220; 25 L. R. A.

143; *State v. Wrightsman,* 56 N. J. L. 126, 28 Atlantic, 56, 22 L.. R. A. 548; *Martin v. McGarr,* 27 Okla. 653, 117 Pac. 323, 38 L. R. A. (N. S.) 1007; *Moran v. Bowley,* 179 N. E. 526; 347 Illinois 148.

As was said in the case of Ex Parte *Siebold,* supra, being an election case for the election of United States Congressmen, "*While the State will retain the power of enforcing its own regulations as are not superceded by those adopted by Congress, it can not be disputed that if Congress has power to make regulations it must have the power to enforce them* * *." Ex Parte *Siebold,* 100 U. S. at 387, 25 L. Ed. at 723.

POINT II. EQUITY JURISDICTION

In 9 R. C. L. page 1002-1003, under the chapter on election districts, and apportionments, we find the text: "*As a general rule the validity of an apportionment act involves a judicial question, which may be raised and determined in a Court of Equity, as well as in a Court of Law by mandamus; State v. Wright,* 58 New Jersey, 138; 22 L. R. A. 548; *State v. Cunningham,* 83 Wis. page 90, *Harrison v. Jefferson,* 54 W. Va. 179."

In 9 R. C. L., page 1006, Section 27: "*While the power of apportioning a state into representative districts is entrusted to the state legislature,* - - - - *this authority is not absolute, but is to be exercised in accordance with certain directions and limitations established by the same instrument which conveys the power and which ordinarily contemplates a division in accordance with certain directions or rules as to equality of population and territory.*"

In Pomeroy's Equity, 3rd Edition, Volume 1, page 260, it is said: "In a large number of states, the rule has been settled in well considered and oft repeated adjudication by courts of the highest character for ability and learning that

a suit in equity will be sustained when brought by any number of taxpayers jointly as co-plaintiffs or by one taxpayer suing on behalf of himself and others similarly situated.

Section 41 and paragraph 1, U. S. C. A., expressly provides that: "The foregoing provisions as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section," and in support of this, under paragraph 14, we cite *Swafford v. Templeton,* 185 U. S. page 492, Ex Parte *Yarborough,* 110 U. S. 651. In *Wylie v. Sinkler,* 179 U. S. page 58, *"The right to vote for members of the Congress of the United States is not derived merely from the Constitution and laws of the states in which they are chosen, but has its foundation in the Constitution of the United States, and the right to vote for congressmen is a right guaranteed and protected by the Constitution of the United States." And this is clearly shown in Ex Parte Yarborough,* 110 U. S., *in which the Court upheld a conviction in the Circuit Court of the United States for conspiracy to intimidate a citizen of the United States in the exercise of his right to vote for a member of Congress, and answers the fallacious argument that the right to vote for a member of Congress is not dependent on the Constitution and laws of the United States.*

Judge Rufus Foster, Circuit Judge in the lower court, whose opinion is attached as a part of the record of this cause, held that it was practicable to divide the State of Mississippi into seven compact and contiguous districts, with each district having approximately the same number of inhabitants. Secondly he holds that a right to vote for a representative in Congress is a right guaranteed by the Constitution of the United States, citing the *Mosely Case,* 238 U. S. 283, supra, and this right to vote implies a right to vote in a legal election. He further held that Section 3 of the Act of August 8, 1911, is mandatory, and must be followed by the State in fixing congressional districts, and the Mississippi Act is violative of the Act of

Congress and is illegal and void, and any election based upon the redistricting act will be illegal, and will deprive the voters of the state of the right guaranteed by the Constitution.

The lower court correctly held *upon the record and facts that the plaintiff has no remedy at law at all, and that an injunction in equity is the proper remedy, and the court of equity has jurisdiction regardless of the amount involved, or the violation of any right of property, to prevent invasion of the right of a citizen guaranteed to him by the Constitution.*

During the month of July, 1932, there was filed in the United States District Court in equity in Kentucky, a suit to declare the Kentucky Reapportionment statute under the last census unconstitutional and void. That case was decided by a three-judge court on August 6, granting the injunction which held the Kentucky statute unconstitutional, and the Kentucky State Court subsequently followed the decision. While this opinion has not yet been officially reported in the Federal Reporter, yet from a verified copy we cite the following holdings of that three-judge Court that portion of the opinion which applies to the points raised in this case is here appended at the end of this brief. In discussing "equity jurisdiction, the District Court of Kentucky said:

> "*In considering this question, two things must be accepted and kept in mind; one is that the plaintiff has the right to approximately equal representation in Congress, which right is secured to him by the Constitution and the statute law of the United States. The other is, that he has no adequate remedy at law in this court to vindicate such right or to redress its deprivation. He certainly could not successfully maintain a common law action for damages against the precinct election officers—because no act of theirs, either proximately or remotely, would deprive him of the*

*right asserted in this cause, * * * Unless, therefore, plaintiff can obtain relief in equity he is remediless so far as this court is concerned. It would seem that the very fact that one has a right secured by law which has been invaded and that he has no remedy at law to protect it, settles that he has such remedy in equity. In the case of Town of Beloit v. Morgan,* 7 Wall, 613, *it was said:*

> " 'The power is reserved to a court of equity to act upon a principle often mentioned, namely: that whenever there is a right, it ought to be made effective. 1 Kaime Prin. Eq. 3. Where there is a right which the common law, from any imperfection, cannot enforce it is the province and duty of equity to supply the defect and furnish the remedy. *Craig v. Stuyvesant,* 2 Paige, 92.'

"And in the cases of *Thompson v. Central Ohio RR.,* 6 Wall. 134, and *Payne v. Hook,* 7 Wall, 425, it was said:

> " 'The absence of a complete and adequate remedy at law, is the only test of equity jurisdiction.'

"The defendant's contention comes to this, that the federal wrong complained of is one that a federal court is powerless to right—a wrong which Section 41 (14) U. S. C. A. *presupposes that it has power to right in equity if not at law. The basis of the contention is that the right sought to be enforced by redressing its deprivation is a political right and a court of equity has no jurisdiction to enforce such a right, even though it cannot be enforced by law.*

"My view of the matter is that a political right may at the same time be a legal right. Such a right is a political matter. In case of such a right if it is invaded and there is no adequate remedy at law to protect it, equity has jurisdiction to do so.

"The defendant strongly urges that the case of *Giles v. Harris,* 189 U. S. 175, is conclusive authority for the position that a court of equity has no jurisdiction to enforce a legal right of a political nature. *As I view that decision it is an authority to the contrary of this. It upholds the position that a court of equity has such jurisdiction if there is no adequate remedy at law.*

" * * * * That there is nothing in the two statements of Mr. Justice Holmes relied on adverse to the position here taken and that the decision itself supports it is evident from two subsequent decisions of the Supreme Court in which Mr. Justice Holmes rendered the opinion. One of these decisions was in the case of *Love v. Griffith,* 266 U. S. 32.

"* * * The decree of the lower court was affirmed, because the question was moot and an injunction would have been worthless. It was not affirmed on the ground that plaintiff was not entitled to the equitable relief which he sought. On the contrary, Mr. Justice Holmes, who delivered the opinion said:

> " 'If the case stood here as it stood before the court of the first instance, it would present a grave question of constitutional law and we should be astute to avoid hindrance in the way of taking it up.'

"This expression leads me to believe that had the election not been held at the time the Supreme Court delivered its opinion the political nature of the controversy would not have been regarded by the court as an obstacle to the granting of equitable relief.

"The other decision was in the case of *Nixon v. Herndon,* 273, U. S. 536.

" * * * It was urged against the complaint that it was an action to enforce a political right. As to this Mr. Justice Holmes, who delivered the opinion of the court, said:

> " 'The objection that the subject matter of the suit is political is little more than a play upon words. Of course, the petition concerns political action, but it alleges and seeks to recover for private damage. That private damage may be caused by such political act and may be recovered for in a suit at law hardly has been doubted for over two hundred years.'

"It is true that that was an action at law. *But he cited in support of the decision not only the decision in Wiley v. Sinkler, which was a law case also, but that of Giles v. Harris, which was an equity one. He saw no difference in the right to enforce a legal right because it is of a political nature, between an action at law and a suit in equity. Why should it be of any significance in a suit in equity that the legal right sought to be enforced is of a political nature when it is of no significance in an action at law.*

" * * * The bill alleges that the Redistricting Act enacted by the last Legislature of this State deprives the plaintiff, a citizen and elector threof, of the right to approximately equal representation in Congress secured by Section 3 of the Act of 1911, and the act of defendant there sought to be enjoined will be performed under color of that statute. This suit is brought to redress that deprivation. It is brought to relieve plaintiff of it and to deliver him from it. *It is a suit in equity. And it is a 'suit authorized by law to be brought.'* In the meaning of the phrase may be met by the consideration that every suit to redress the deprivation of a right is authorized by law to be brought. Where there is a wrong there is a remedy.

If its meaning is 'authorized by statute to be brought', it is met by Section 43, Title 8, U. S. C. A., Rev. Stat. Sec. 1979, which is in these words:

> " 'Every person who under color of any statute, ordinance, regulation, custom or usage of any state or territory subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the constitution and laws shall be liable to the party injured in an action at law.'
>
> "The defendant under the color of the Congressional Redistricting Act enacted by the last Legislature of this State is about to take a step and unless enjoined will take it under color of that statute which subjects the plaintiff, a citizen of the United States, to the deprivation of his right to approximately equal representation in Congress secured to him by the federal Constitution and laws and a suit in equity against the defendant to enjoin her taking such step is a suit to redress such deprivation, i.e., to relieve of it and deliver him from it.
>
> "It would seem to be inescapable, therefore, as to the jurisdiction of this court as a Federal Court that the bill makes out a case. * * * " *Hume v. Mahon* (Decided in Federal three-judge court in Kentucky, Aug. 6, 1932, and not yet reported in Advance Sheets.)

The question involved in this case is not only the equal right of appellee to vote in a legal Congressional Election but his right of equal representation in Congress.

Appellee files his suit in three capacities, to-wit: as a citizen, as a tarpayer, and as a qualified elector.

The right to vote in a Congressional election is such a right as the Federal Courts will protect, and Appellee is, therefore, entitled to maintain this action.

Our Constitution provides that every citizen is entitled to the equal protection of the laws. In addition to this, Sec. 3 of the Act of Congress of August 8, 1911, provides that Congressional Districts shall contain as nearly as practicable an equal number of inhabitants. Nothing is said about electors nor any other class of citizens, but it is purely a question of the number of inhabitants.

Under this statute, equal representation is provided for all inhabitants, whether electors or not.

The Attorney-General of Mississippi, in his brief before the lower Court, cited a number of definitions of "civil" rights and "political" rights.

> "Political rights are those which may be exercised in the formation or administration of the government; the term 'rights' as used in this definition, being synonymous with 'power' ". *People v. Morgan,* 90 Ill. 558, 563.

> "Political rights consist in the power to participate directly or indirectly in the establishment or management of government. The elective franchise and the right to hold public office constitute the principal political rights of the citizens of the several states." *People v. Washington,* 36 Cal. 658, 662.

The two citations above are taken from the brief of the Attorney General and show that political rights are those rights or powers of citizens to participate in the establishment or formation of the government. They presuppose the doing of some act by the citizen, the doing of which would necessarily require him to be an elector.

> "A 'civil' right is a right accorded to every member of a district, community, or nation". *Winnet v. Adams,* 99 N. W. 681, 71 Neb. 817.

"The term 'civil' rights ordinarily means all those rights which the laws give a person, which depend upon the laws of the community in which he lives and of which he is a member." *Bowles v. Haverman*, 95 N. Y. 246, 247.

These definitions of civil rights are likewise taken from the brief of the Attorney General and, under them, a civil right is a right provided by law for every citizen and does not require the exercise by such citizen of any power nor does it require the doing of any act.

The guarantee of equal representation is, therefore, a right for the security of which no citizen is required to perform any act. He is not required to vote for it. Indeed he may not be qualified to vote, yet, our laws guarantee that right to him. It does not require him to participate in the formation of the government, nor does it require him to directly or indirectly participate in the administration of the government.

It is a right that stands guaranteed to him, regardless of his or anybody's political action.

This suit could be maintained by any citizen, whether he were a qualified elector or not, to protect his "civil right" of "Equal Representation."

Therefore the questions whether or not the power was exercised by the "legislature" within the meaning of Art. I, Sec. 4 (U. S. Const.), and whether the exercise of the power is within, or complies with, such federal constitutional provisions and statutory law, are *federal questions; and no decision by a state court can preclude this Court from determining these questions.* This Court has stated that when essential to the enforcement of rights asserted under the federal Constitution, it will review the decision of a state court.

Beidler v. So. Car. Tax Comm'n (1930), 282 U. S. 1, 51 Sup. Ct. 54, 75 L. Ed. 131.

Mitchell v. Clark (1884), 110 U. S. 633, 4 Sup. Ct. 170, 28 L. Ed. 279.

Carter v. Texas (1900), 177 U. S. 442, 20 Sup. Ct. 687, 44 L. Ed. 839.

Rogers v. Hennepin County (1916), 240 U. S. 184, 36 Sup. Ct. 265, 60 L. Ed. 594.

California v. Deseret Water Co. (1917), 243 U. S. 415, 37 Sup. Ct. 394, 61 L. Ed. 821.

Blodgett v. Silbermann (1928), 277 U. S. 1, 48 Sup. Ct. 410, 72 L. Ed. 749.

People v. Baldwin (1930), 341 Ill. 604, 174 N. E. 51.

It must necessarily follow that the right of the appellee to participate in the election of congressman from the State of Mississippi is a right to flow to him out of the constitution of the U. S. if he is a legal voter of the State of Mississippi, and that is confessed in the answer. Then, if this right of the appellee is guaranteed and protected by the constitution and since Congress, having entered the field, may alter or enact any law relative to federal elections as held in the *Seabold Case,* 100 U. S. Page 371, (Supra) then appellee's right extends to the right to participate in that sort and kind of an election for Congress as ordained shall be held in choosing its members, and it must follow from these decisions that the right extends to the elector to cast his vote in a district formed in contiguous and compact territory with practically an equal number of inhabitants and in a district where his vote will count and equal the vote of electors in every other district as nearly as practicable. The right of equality of representation is the bed rock upon which government is based, and it was the lack of equal representation that separated the colonists from the mother country and brought them to this land to obtain equal representation, equality of burden, equality of benefits, equality of taxation, as shown by the bill of rights. This principle is recognized by all the authorities and this view is discussed and sustained by the following authorities:

State v. Cunningham, 83 Wis. 90, 35 Am. St. Rep. 27, 53 NW 35, 17 LRA, 145; *Williams v. Secty. of State,* 144 Ind. 503, 42 NE 929, 31 LRA 126; *Harmison v. Ballot,* Com. 45 W. Va. 179, 31 SE 394, 42 LRA 591; *State v. Wrightson,* 56 NJL 126, 28 Atl. 56, 22 LRA 548; *Giddings v. Sec. of St.* 93 Mich. 1, 52 NW 944, 16 LRA, 402; *Parker v. State* 133 Ind. 178, 32 NE 836, 33 NE 119, 18 LRA 567; *Coms. v.Blacker,* 92 Mich. 638, 52 NW 951, 16 LRA 432; *State v. Cunningham,* 81 Wis. 440, 51 NW 724, 15 LRA, 561; *People v. Thompson,* 155 Ill. 451, 40 NE 307; *People v. Rice,* 185 N. Y. 473, 31 NE, 921, 16 LRA 836; *Baird v. Supervisors,* 138, N. Y. 95, 33 NE 827, 20 LRS 81.

It is suggested in the authorities quoted, and rightly so, that no citizen will or ought to love the state which oppresses him and denies him the equal protection of the law and a citizen who is deliberately and arbitrarily oppressed and denied equal representation with every other citizen of the state, can scarcely love and be loyal to the country which denies him such privilege right and immunities, and denies him the right to exercise all the rights and privileges that the laws allow him. To the extent to which the courts will review congressional redistricting acts of the state legislatures and holding that the apportionment act is not exclusive within the political power of the legislature as will preclude the courts from inquiring into the constitutionality of such statutes when the question is properly brought before the courts may be found in the following authorities: *Parker v. Powell,* 133 Ind. 178; *Denny v. State,* 144 Ind. 503; *Ragland v. Anderson,* 125 Ky. 141; *Attorney General v. Suffolk Co.* 224. Mass 198; *Giddings vs. Blacker,* 93 Mich. 1; *Baird vs. Hitchcox,* 141 Mo. 433; *Wayne v. Stoddard,* 25 Nev. 452; *Morris v. Wrighton* 56, NJL 126; *Biddell v. Crow,* 178 Pa. 234; *Thompson vs. Ballot* 45 W. Va. 179; *Atty-General vs. Cunningham,* 81 Wis. 440; *Woodyatt vs. Thompson,* 155 Ill. 451; *Williams vs. State,* 145, Mich. 448; *Neighen vs. Weatherhill,* 125 Minn. 336; *Hart v. Morehead,* 99 Neb. 527; *Bird v. King County,* 139 N. Y. 95; *Gallahan v. Campbell,* 48 Ohio, 435; *Warren v. Howell,* 92 Wash. 540.

Cases in which the requirement of equality of inhabitants where the Courts have held the rules laid down by congress violated may be found in the following authorities:

Woodyatt v. Thompson, 155 Ill, 451;

Carroll v. Becker, (Mo.) 45 SW (2nd) 494;

Moran v. Bowley (Ill.) decided Jan. 1932, NE Rep. Mar. 2nd, 526;

Brooks vs. State, 162 Ind. 568;

Ragland v. Anderson, 125 Ky. 141;

Suffolk County, supra, 124 Mass. 598;

Giddings vs. Blacker, supra, 93 Mich. 1;

Stevens vs. State, 181 Mich. 199;

Barrett vs. Hitchcox, supra, 145 Mo. 435;

State v. Morehead, supra, 95 Neb. 527;

Bird vs. King Co., supra, 138 N. Y. 95;

Re Dowling, 219, N. Y. 44;

Williams vs. Woods, (Tex.) 162 SW 1030;

Lamb vs. Cunningham, supra, 83 Wis. 90.

It is interesting to note that in *Grisby v. Harris,* 27 Federal 942, Second Series, Judge Hutchinson, in deciding the case, said, "I incline to think that those cases which have so uniformly affirmed the want of power in the court of equity to grant relief are *all cases* which either were or by the court deciding them held cases where plaintiff's rights were *only political* and, therefore, extralegal and that the political character of the subject matter of right could not prevent relief in equity, I think more reasonable. I incline to think with Justice Holmes that the objection that the subject matter of the suit is political is little more than a play on words."

We invite the attention of the Court to the dissenting opinion of Justice Cook in *Wood v. State* found in advance sheets Southern Reporter July 28, 1932, 142 So. 747 at page 754, which is a most able and exhaustive review of the authorities, and in line with the Federal decisions and the best considered state decisions.

CONCLUSIONS

The Act of Congress of August 8th, 1911, Sec. 3, Chapter 5, 37, Stat. at L. 13 U. S. C. title 2 No. 2 is still in force and is effective. See opinion of Justice Hughes in *Smiley v. Holm* (Supra). Therefore, we conclude that the Congressional Redistricting Act passed by the Legislature of Mississippi in 1932 is unconstitutional and void because it does not preserve compactness, or equality of representation, and thereby the rights of every inhabitant as fixed by the laws of Congress and guaranteed by the constitution to have his representative to Congress elected from compact and equally populated districts, is infringed and avoided. We further submit that such citizen or inhabitant may go in to the Courts of the United States and have his rights redressed in equity in the absence of an adequate remedy at law.

We respectfully submit that we are entitled to the relief prayed for in the bill, and that the decision of the three-judge court should be affirmed.

Respectfully submitted,

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APPENDIX

MISSISSIPPI STATUTES

Section 5877, Code, 1930—How Certain Expenses Paid. —All the expenses of printing the tickets or primary election ballots, and for necessary stationery, for paying the managers, clerks, bailiffs and returning officer of every primary election authorized by this chapter held in any county, shall be paid by the Board of Supervisors of such county out of the general funds of the county, but such officers of primary elections shall receive only such compensation as is authorized by chapter on Registration and Elections to be paid managers, clerks, bailiffs and returning officers for like services in holding elections thereunder; provided however, that this section shall not apply to the expenses of a primary election held by any political party which at the next preceding national presidential election did not vote as many as thirty-three and one third per cent of the total vote cast in the entire state.

Section 5899, Code, 1930.—Tabulated Vote to be Furnished Secretary.—The chairman of the State Senatorial and flotorial executive committees respectively shall transmit to the Secretary of State a tabulated statement of the party vote cast in each county in each state and district election, which statement shall be filed by the Secretary of State and preserved among the records in his office.

Section 6209, Code, 1930.—When General Elections Held.—All elections by the people shall be by ballots, and shall be concluded in in one day. A general election shall be held in the several counties on the first Tuesday after the first Monday in the year, 1931, and every four years thereafter.

Section 6226, Code, 1930.—Official Ballot: Expenses of Printing.—The ballots in all elections shall be printed and distributed at the public expense, and shall be known

as "official ballots". The expense of printing such ballots shall be paid out of the county treasury, except in municipal elections such expenses shall be paid by the respective cities, towns, and villages.

Section 635, Code, 1930.—Statement of Votes Sent to Secretary of State.—The Commissioners of election shall, within ten days after the election, transmit to the Secretary of State, to be filed in his office, a statement of the whole number of votes given in their county for each candidate for any office at the election; but the returns of every election for governor, lieutenant-governor, secretary of state, attorney-general, auditor of public accounts, state treasurer, state superintendent of education, land commissioner, insurance commissioner, and clerk of the Supreme Court, and other state or state district officers, shall each be made out separately, sealed together, and transmitted to the seat of government, directed to the secretary of state, and endorsed, the "vote for state officers", to be delivered by the secretary of state to the speaker of the House of Representatives at the next ensuing session of the Legislature. Constitutional amendments shall be voted for at the time fixed by the concurrent resolution. The election, whether held separately or with other elections, shall be conducted, in all respects, as required for elections generally. The returns shall be made by the election commissioners to the Secretary of State and shall be tabulated by him and submitted to each branch of the legislature, at the session next ensuing.

Section 6252, Code of 1930.—Duty of Secretary of State as to Returns, What Done in Case of Tie.—The Secretary of State, immediately after receiving the returns of an election, not longer than thirty days after the election, shall sum up the whole number of votes given for each candidate other than for state offices, ascertain the person or persons having the largest number of votes for each office, and declare such person or persons to be duly elected; and thereupon all persons chosen to any office at

the election shall be commissioned by the governor; but if it appear that two or more candidates for any district office where the district is composed of two or more counties, standing highest on the list, and not elected, have an equal number of votes, the election shall be forthwith decided between the candidates having an equal number of votes by lot, fairly and publicly drawn, under the direction of the governor and secretary of state.

Section 6277, Code of 1930.—Number of Representatives, Changes, How Elected.—Should an election of representatives in Congress occur after the number of representatives to which the state is entitled shall be changed, in consequence of a new apportionment being made by Congress, and before the districts shall have been changed to conform to the new apportionment, representatives shall be chosen as follows: In case the number of representatives to which the state is entitled be increased, then one member shall be chosen in each district as organized, and the additional member or members shall be chosen by the electors of the state at large; and if the number of representatives shall be diminished, then the whole number shall be chosen by the electors of the state at large.

Section 6231, Code of 1930.—Ballots What to Contain.—The ballot shall contain the names of all condidates who have been put in nomination, not less than fifteen days previous to the day of election, by the primary election of any political party. There shall be printed on the ballots the names of all candidates so nominated, whether the nomination be otherwise known or not, upon the written request of one or more of the candidates so nominated, or of any qualified elector who will make oath that he was a participant in the primary election, and that the person whose name is presented by him was nominated by such primary election. The commissioner shall also have printed on the ballot the name of any qualified elector who has been requested to be a candidate for any office, by a written petition signed by at least fifteen electors, for any beat or

municipal office in a town or village of less than three hundred inhabitants, or fifty qualified electors for any other office, and when the petition or request has been presented to said commissioner not less than fifteen days before the election; but if any candidate has been so nominated or has been so requested to become a candidate, less than fifteen days before the election, his name shall not be printed on the ballot.

Section 6234, Code, 1930.—Arrangements of Names on Ballots; Sample Ballots.—The arrangement of the names of the candidates, and the order in which the title of the various offices shall be printed, and the size, print, and quality of paper of the official ballot is left to the discretion of the officer charged with printing the official ballot; but the arrangement need not be uniform. It is the duty of the Secretary of State, with the approval of the Governor, to furnish the designated commissioner of each county a sample of the official ballot, the general form of which shall be followed as nearly as practicable; Provided that in all primary elections the names of the candidates for each office separately shall be arranged alphabetically.

FILED

No. 424

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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION.

WALKER WOOD, Secretary of State, Et Al., - Appellants,

versus

STEWART C. BROOM, - - - - - - - Appellee.

BRIEF FOR APPELLEE.

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IN THE

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OCTOBER TERM, 1932.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION.

WALKER WOOD, SECRETARY OF STATE, ET AL., - - - - - - *Appellants,*

v.

STEWART C. BROOM, - - - - - - - *Appellee.*

BRIEF FOR APPELLEE.

If this Honorable Court please:

This is a suit to test the validity of House Bill No. 197, Regular Session of the Mississippi Legislature of 1932, better known as the Mississippi Redistricting Act. The case was heard below by a *Special Court,* composed of *Hon. Rufus E. Foster, Circuit Judge, Hon. Edwin R. Holmes* and *Hon. Benjamin C. Dawkins, District Judges,* and their ruling was against the validity of the Act. The case is here under the provisions of *Section 266, Judicial Code* (*28 U. S. C. A., Sec. 380*).

STATEMENT OF FACTS.

Prior to the Fifteenth Census, the State of Mississippi was entitled to elect eight members of the National House of Representatives, commonly known as Congressmen. Under the re-apportionment following that census, the State was allotted seven Congressmen (*House Doc. No. 664*), and it thereupon becomes the duty of the Mississippi Legislature to permit these seven Congressmen to be chosen from the State at large, or to re-arrange the State into seven Congressional Districts, composed

> "of contiguous and compact territory and containing as nearly as practicable an equal number of inhabitants."

This the Legislature essayed to do, and when it finally emerged with its *Redistricting Act* (*House Bill No. 197*), it had arranged the State of Mississippi into seven Congressional Districts, with approximately the number of inhabitants set forth in the following tabulation:

(a) A First District with approximately 241,000 inhabitants.
(b) A Second District with approximately 219,000 inhabitants.
(c) A Third District with approximately 402,000 inhabitants.
(d) A Fourth District with approximately 184,000 inhabitants.
(e) A Fifth District with approximately 244,000 inhabitants.

(f) A Sixth District with approximately 284,000 inhabitants.

(g) A Seventh District with approximately 441,000 inhabitants.

Conceiving that such a statute was within neither the letter nor the spirit of the *Act of Congress of August 8, 1911,* which flowed out of *Art. 1, Sec. 4,* of the *Constitution of the United States,* complainant brought this suit, with the result stated.

It is now the burden of this Court to examine the questions presented and to apply the law, and we shall state and consider these questions as they appear to us to arise on this record.

THE LEGAL ISSUES.

We have not seen a brief for the appellants, and therefore state the questions presented as we see them.

(a) The right to vote when it has once been granted becomes a vested right and so remains until withdrawn by a law of equal dignity with the Act that granted the right.

(b) A citizen who is also a qualified voter, may invoke the aid of equity to protect his right to exercise his suffrage in all legal ways, for the right of suffrage when conferred is both political and legal.

(c) The right to vote for Congressmen flows out of the Constitution of the United States to all those to whom that right has been granted by the States. It is guaranteed and protected by the Federal Constitution.

(d) The Congress has power to control congressional elections, and when it speaks to that end its enactments are controlling on the several States. The *Act of August 8, 1911 (2 U. S. C. A., Sec. 3, 37 Stat. at L. 14)* is a valid exercise of that power by Congress, is still in force and unrepealed.

We shall now proceed as briefly as may be to examine each of these questions.

I.

One who is deprived of the right of equal suffrage in the choice of federal officers, when that right has been granted by a State, is deprived of a vested right under the *Constitution of the United States* and of one which equity as administered in the Federal Courts will protect.

(a) Cooley, Principles of Constitutional Law, p. 248.
(b) Gougar v. Timberlake, 148 Ind. 41, 46 N. E. 339, 62 Am. St. Rep. 489, 37 L. R. A. 648.
(c) *Ex parte* Yarbrough, 110 U. S. 651, 4 Sup. Ct. Rep. 152, 28 L. Ed. 274.
(d) Wiley v. Sinkler, 179 U. S. 58, 21 Sup. Ct. Rep. 17, 45 L. Ed. 84.

The right of suffrage is not a natural right attendant on citizenship (*Van Valkenburg v. Brown, 43 Cal. 43, 13 Am. Rep. 136; Spencer v. Board of Registration, 1 MacArthur, 169, 29 Am. Rep. 582; Gougar v. Timberlake, 148 Ind. 38, 46 N. E. 339, 62 Am. St. Rep. 489, 37 L. R. A. 648*). But the right to vote for Congressmen and Senators is a right which springs fundamentally from the Federal Constitution, which created

the offices, made them elective and pointed out who should be electors (*Ex parte Yarbrough, 110 U. S. 651, 4 Sup. Ct. Rep. 152, 28 L. Ed. 274; Wiley v. Sinkler, 179 U. S. 58, 21 Sup. Ct. Rep. 17, 45 L. Ed. 84; Pope v. Williams, 193 U. S. 621, 24 Sup. Ct. Rep. 573, 48 L. Ed. 817*), and when once the right of suffrage has been conferred by a State, it becomes a vested right entitled to protection just as property is entitled to be protected.

The right of suffrage in Mississippi to citizens of that State and which is to be exercised as to both State and Federal officers, is conferred by *Art. 12, Sec. 241,* of the *Constitution of Mississippi,* which reads thus:

> Every male inhabitant of this State, except idiots, insane persons and Indians not taxed, who is a citizen of the United States, twenty-one years old and upwards, who has resided in this State two years, and one year in the election district, or in the incorporated city or town, in which he offers to vote, and who is duly registered as provided in this article, and who has never been convicted of bribery, burglary, theft, arson, obtaining money or goods under false pretenses, perjury, forgery, embezzlement or bigamy, and who has paid, on or before the first day of February of the year in which he shall offer to vote, all taxes which may have been legally required of him, and which he has had an opportunity of paying according to law, for the two preceding years, and who shall produce to the officers holding the election satisfactory evidence that he has paid said taxes, is declared to be a qualified elector; but any minister

> of the gospel in charge of an organized church shall be entitled to vote after six months' residence in the election district, if otherwise qualified.

The right thus conferred is a vested right until altered by the fundamental law is conferred by the Constitution of the United States, and to be protected in equity as rights of property are protected.

That the right to vote for members of Congress is a vested right conferred by the *Constitution of the United States* is settled by *Ex parte Yarbrough, 110 U. S. 651, 4 Sup. Ct. Rep. 152, 28 L. Ed. 274,* and *Wiley v. Sinkler, 179 U. S. 58, 21 Sup. Ct. Rep. 17, 45 L. Ed. 84.* In the latter case it was said by *Mr. Justice Gray:*

> The right to vote for members of the Congress of the United States is not derived merely from the Constitution and laws of the State in which they are chosen, but has its foundation in the Constitution of the United States.
>
> This is clearly and amply set forth in *Ex parte* Yarbrough, 110 U. S. 651, 28 L. Ed. 274, 4 Sup. Ct. Rep. 152, in which this court, speaking by Mr. Justice Miller, upheld a conviction in a circuit court of the United States under Sec. 5508 and 5520 of the Revised Statutes for a conspiracy to intimidate a citizen of the United States in the exercise of his right to vote for a member of Congress, and answered the proposition "that the right to vote for a member of Congress is not dependent upon the Constitution or laws of the United States, but is governed by the law of each state respectively," as follows:

But it is not correct to say that the right to vote for a member of Congress does not depend on the Constitution of the United States. The office, if it be properly called an office, is created by that Constitution, and by that alone. It also declares how it shall be filled, namely, by election. Its language is: "The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature." Art. 1, Sec. 2. The states, in prescribing the qualifications of voters for the most numerous branch of their own legislatures, do not do this with reference to the election for members of Congress. Nor can they prescribe the qualification for voters for those *eo nomine*. They define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for members of Congress in that State. It adopts the qualification thus furnished as the qualification of its own electors for members of Congress. It is not true, therefore, that electors for members of Congress owe their right to vote to the state law in any sense which makes the exercise of the right to depend exclusively on the law of the state." 110 U. S. 663, 28 L. Ed. 278, 4 Sup. Ct. Rep. 152.

The court then, referring to the statement of Chief Justice Waite in Minor v. Happersett, 21 Wall. 162, 178, 22 L. Ed. 627, 631, that "the Constitution of the United States does not confer the right of suffrage upon anyone," explained that statement as follows: "But the court was

> combatting the argument that this right was conferred on all citizens, and therefore upon women as well as men. In opposition to that idea, it was said the Constitution adopts as the qualification of voters for members of Congress that which prevails in the state where the voting is to be done; therefore, said the opinion, the right is not definitely conferred on any person or class of persons by the Constitution alone, because you have to look to the law of the state for the description of the class. But the court did not intend to say that, when the class or the person is thus ascertained, his right to vote for a member of Congress was not fundamentally based upon the Constitution, which created the office of member of Congress, and declared it should be elective, and pointed to the means of ascertaining who should be electors." 110 U. S. 664, 28 L. Ed. 278, 4 Sup. Ct. Rep. 152.

And that this right when conferred is entitled to protection is thus laid down in *Cooley's Principles of Constitutional Law,* p. 248, thus:

> Participation in the suffrage is not of right, but it is granted by the state on a consideration of what is most for the interest of the state. Nevertheless, the grant makes it a legal right until it is recalled, and it is protected by the law as property is.

We think that the right to cast a vote for a Congressman of the United States

(a) Is a vested right.

(b) Guaranteed by the Constitution of the United States.
(c) And entitled to protection when in any way infringed.

and that if Congress has ordained that the right may be exercised in a certain way, that then equity will see to it that the owner of the right may so exercise it.

In Mississippi the right to vote for all offices, State and Federal, was conferred on all male inhabitants, of a certain age and of a certain description (*Const. Miss., 1890, Art. 12, Sec. 241, supra*). By the *XIXth Amendment* to the *Federal Constitution*, the right to vote was also conferred on the female citizens of Mississippi, who possessed the same qualifications as those required of males by the Constitution of that State.

It was ordained by *Congress* in *1911* (*Act August 8, 1911, Ch. 5, Sec. 3, 2 U. S. C. A., Sec. 3, 37 Stat. at L. 14*), that in the election of Congressmen, this right of suffrage, if the State were parceled into districts, should be exercised in districts made up of territory

(a) That was contiguous.
(b) That was compact.
(c) And that contains as nearly as may be an equal number of inhabitants.

and therefore it may be said we think that one qualified to vote for members of Congress may demand as a matter of constitutional right that he be so placed by the Legislature that he may cast his vote in a district constructed according to the plan laid down by

Congress. If he is by a State Legislature denied this right then equity will enforce it by declaring the State Act which infringes it unconstitutional and invalid (*Hume v. Mahan, District Court Eastern District of Kentucky, September 3, 1932, not yet reported*).

II.

A qualified voter in a State, who is denied the right of equal representation by a State Congressional Redistricting Act, may complain against the Act in equity in a Federal Court, in his own name and person.

(a) Smiley v. Holm, 285 U. S. 355, 52 Sup. Ct. Rep. 397, 76 L. Ed. 600.

(b) Koenig v. Flynn, 285 U. S. ——, 52 Sup. Ct. Rep. 403, 76 L. Ed. 608.

(c) Carroll v. Becker, 285 U. S. ——, 52 Sup. Ct. Rep. 402, 76 L. Ed. 609.

(d) U. S. Rev. Stat., Sec. 563, par. 12, Sec. 629, par. 16, 36 Stat. at L. 1092, 4 Fed. Stat. Ann. 840, 28 U. S. C. A., Sec. 41, par. 14.

Analogous to this proposition are the holdings of the various State Courts, in respect of allowing relief in equity to a qualified voter, who is aggrieved by legislation arranging the State into State Representatives and Senatorial Districts, so as to deny equality of representation as near as may be (*Hagar v. Robinson, 154 Ky. 489, 157 S. W. 1138; Schardein v. Harrison, 230 Ky. 1, 18 S. W. (2d) 316; Ragland v. Anderson, 125 Ky. 141, 100 S. W. 865, 128 Am. St. Rep. 242; Yate's Clerk v. Collins, 118 Ky. 682, 82 S. W. 282;*

Stiglitz v. Schardein, 239 Ky. 799, 40 S. W. (2d) 315; State v. Cunningham, 83 Wis. 90, 53 N. W. 35, 17 L. R. A. 145, 35 Am. St. Rep. 27; Williams v. Secretary of State, 145 Mich. 447, 108 N. W. 749; Denny, et al., v. State, 144 Ind. 503, 42 N. E. 929, 31 L. R. A. 726; Harmison v. Ballot Commissioners, 45 W. Va. 179, 31 S. E. 394, 42 L. R. A. 591; State v. Wrightson, 56 N. J. Law, 126, 28 A. 56, 22 L. R. A. 548; Giddings v. Secretary of State, 93 Mich. 1, 52 N. W. 944, 16 L. R. A. 492; Parker v. State, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L. R. A. 567; Board of Sup'rs of County of Houghton v. Blacker, Secretary of State, 92 Mich. 638, 52 N. W. 951, 16 L. R. A. 432; State v. Cunningham, 81 Wis. 440, 51 N. W. 724, 15 L. R. A. 561; People v. Thompson, 155 Ill. 451, 40 N. E. 307; People v. Rice, 135 N. Y. 473, 31 N. E. 921, 16 L. R. A. 836; Baird v. Supervisors, 138 N. Y. 95, 33 N. E. 827, 20 L. R. A. 81).

We can perceive no good reason why this right to seek relief should be denied a suitor by this Court, when it is allowed in all the States to one aggrieved by legislation of purely State concern. It has been held by this Court that the prime object of all litigation is to establish a right asserted by a plaintiff or to sustain the opposing defense (*Tyler v. Judges of the Court of Registration, 179 U. S. 405, 21 Sup. Ct. Rep. 206, 45 L. Ed. 252*), and the right of suffrage when conferred is an individual, personal right, and the right to complain of its infringement is personal to its possessor.

That the right of equality of representation is a

valuable right is merely the assertion of a fact established by history (*3 Woodrow Wilson History of the United States, 98-183*), and it is the corner stone to the foundation of all representative government (*Dicey Law of the Constitution, p. LXVI*). Its value is thus described by *Judge Barker* in *Ragland v. Anderson, 125 Ky. 141, 100 S. W. 865, 128 Am. St. Rep. 242:*

> The definition of equality of representation as above contained, and the principle that any act of the legislature which violates a constitutional requirement for that equality of representation is void, is sustained by the following authorities: State v. Cunningham, 83 Wis. 90, 35 Am. St. Rep. 27, 53 N. W. 35, 17 L. R. A. 145; Williams v. Secretary of State, 145 Mich. 447, 108 N. W. 749; Denney v. State, 144 Ind. 503, 42 N. E. 929, 31 L. R. A. 126; Harmison v. Ballot Commissioners, 45 W. Va. 179, 31 S. E. 394, 42 L. R. A. 591; State v. Wrightson, 56 N. J. L. 126, 28 Atl. 56, 22 L. R. A. 548; Giddings v. Secretary of State, 93 Mich. 1, 52 N. W. 944, 16 L. R. A. 402; Parker v. State, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L. R. A. 567; Commissioners v. Blacker, 92 Mich. 638, 52 N. W. 951, 16 L. R. A. 432; State v. Cunningham, 81 Wis. 440, 51 N. W. 724, 15 L. R. A. 561; People v. Thompson, 155 Ill. 451, 40 N. E. 307; People v. Rice, 185 N. Y. 473, 31 N. E. 921, 16 L. R. A. 836; Baird v. Supervisors, 138 N. Y. 95, 33 N. E. 827, 20 L. R. A. 81. He has studied our constitution in vain who has not discovered that the keystone of that great instrument is equality—equality of men, equality of representation, equality of burden, and equal-

ity of benefits. Section 1 of the Bill of Rights provides: "All men are by nature free and equal." Section 33 provides for equality of representation. Sections 171, 172, 173 and 174 provide for equality of taxation (uniformity). Section 39 provides for equality (general) of laws. Indeed, it could not be otherwise, for when our forefathers emigrated from their European home it was in the main to escape from the oppression of inequality. They brought with them a burning love for this great democratic principle and imbedded it deep in the foundation of the empire they were destined to erect, and which they will preserve so long as the love of liberty is more than a name. When they threw off the supervising government of the mother country, it was because they were denied equality of representation; or, as they then expressed the evil, they had imposed upon them taxation without representation.

Equality of representation is a vital principle of democracy. In proportion as this is denied or withheld, the government becomes oligarchical or monarchical. Without equality Republican institutions are impossible. Inequality of representation is a tyranny to which no people worthy of freedom will tamely submit. To say that a man in Spencer County shall have seven times as much influence in the government of the state as a man in Ohio, Butler or Edmonson, is to say that six men out of every seven in those counties are not represented in the government at all. They are required to submit to taxation without representation. It was this kind of oppression which inspired that great struggle for freedom

> which began on Lexington Green in 1775, and ended at Yorktown in 1781. Equality of representation is the basis of patriotism. No citizen will, or ought to, love the state which oppresses him; and that citizen is arbitrarily oppressed who is denied equality of representation with every other citizen of the commonwealth.

That this right may be enforced in equity in the Federal Courts at the suit of one aggrieved may be gathered from the cases of *Smiley v. Holm, 285 U. S. 355, 52 Sup. Ct. Rep. 397, 76 L. Ed. 600.* We have the transcript in that case before us and the right and interest of the complainant is thus set down in the Bill of Complaint:

> The petition of W. Yale Smiley respectfully shows to the Court that he is a citizen, elector and taxpayer of the State of Minnesota, residing in the City of Minneapolis, Hennepin County, Minnesota, in the Fourth Ward of said City.

In *Koenig v. Flynn, 285 U. S. ——, 52 Sup. Ct. Rep. 403, 76 L. Ed. 608,* the right and interest of complainant is thus described:

> The petitioners by Abraham S. Gilbert and Benjamin L. Fairchild, their attorneys, for their petition herein allege:
>
> First: That they are severally citizens and qualified voters of the State of New York, and that the petitioner Samuel S. Koenig is the Chairman of the Republican County Committee of New York County; that the petitioner John J.

> Knewitz is the Chairman of the Republican County Committee of Bronx County; and that the petitioner William L. Ward is the Chairman of the Republican County Committee of Westchester County.

In *Carroll v. Becker, 285 U. S. ——, 52 Sup. Ct. Rep. 402, 76 L. Ed. 609,* it is thus described:

> This Relator respectfully represents and shows to this Honorable Court that he is a citizen, inhabitant and elector of the State of Missouri, and resides in the City of St. Louis, Missouri, in the Fifth Ward of said City, and that he is now 28 years of age, and is, and since the time of his birth, has been a citizen of the United States of America.

That this right may be enforced in the Federal Courts is expressly provided by *Rev. Stat. U. S., Sec. 563, par. 12, Sec. 629, par. 16, Act of March 3, 1911, Ch. 231, Sec. 24, par. 14, 36 Stat. at L. 1092, 4 Fed. Stat. Ann. 840, 28 U. S. C. A., Sec. 41, par. 14,* which provides that the Courts of the United States shall have jurisdiction:

> Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any State, of any right, privilege, or immunity, secured by the Constitution of the United States or of any right secured by any law of the United States providing for equal rights of citizens of the United

States, or of all persons within the jurisdiction of the United States.

If the right to vote is a civil right, and it is, and if it is to be exercised, so that all men shall stand on an equal footing in acquiring representation, then that right is infringed by an Act which makes one man in one district equal to two and a half men in another, and the right may be enforced by declaring the Act invalid and putting the election to the State at large, thus insuring absolute equality.

III.

The power to regulate the election of members of the National House of Representatives resides in Congress. When it has spoken its regulations are paramount and controlling on the States.

(a) *Ex parte* Siebold, 100 U. S. 371, 25 L. Ed. 717.
(b) Smiley v. Holm, 285 U. S. 355, 52 Sup. Ct. Rep. 397, 76 L. Ed. 600.
(c) People *ex rel.* v. Voorhis, 222 N. Y. 494, 119 N. E. 106.
(d) Hume v. Mahan, Dist. Ct. East. Dist. Ky., Sept. 3, 1932 (not yet reported).

Members of Congress are officers of the United States, made so by the Constitution. The several States have no concern with their tenure, salary, powers, or duties and no powers at all save to provide for their election, as Congress may direct. In the absence of congressional action, the States might regulate the entire mode of electing Congressmen, and as a matter

of fact prior to 1842, the whole matter of electing Congressmen was left open to the States.

Judge Cochran of the *Eastern District of Kentucky* has in *Hume v. Mahan* (*September 3, 1932,* not yet reported) given a history of the growth of congressional legislation, respecting the election of members of Congress as follows:

> Section 3 of the Act of 1911 enacted pursuant to the Constitution provides for such representation amongst the citizens of the several states. The right thereto is thereby conferred upon them and secured to them.
>
> Until 1842 the respective States were left to their own devices as to the manner of electing Representatives in Congress. Some were elected from the State at large, but in a large part the States were divided by their respective Legislatures into Congressional Districts and their Representatives in Congress were elected from these districts. For the first time, by the Act of June 25, 1842 (5 U. S. Statutes at Large, 491), the Congress asserted its power over the method of selecting its members. Section 2 of that Act required that Congressmen should be elected by districts composed of contiguous territory, but no provision was made for equality of population.
>
> The law continued in this condition until 1872, when Congress, by the Act of January 2, 1872 (17 U. S. Statutes at Large, 28), added to the requirement of contiguous territory the further requirement that each district should contain as nearly as practicable an equal number of inhabitants, and similar provisions were incorporated

in the Act of February 25, 1882 (22 U. S. Statutes at Large, 5), and in the Act of February 7, 1891 (26 Statutes at Large, 735). By the Act of February 16, 1901 (31 U. S. Statutes at Large, 735), Congress added to the requirement of contiguous territory and equality of population the further requirement that the districts should be compact, and this provision of the Act of 1901 was carried over in identical language into Section 3 of the Act of August 8, 1911 (Title 2, Section 3, U. S. C.).

That *Congress* may under *Art. 1, Sec. 4,* of the *Constitution* assume and direct the whole subject of election of its members is settled in this *Honorable Court,* and in various *State Courts,* and that when Congress legislates on the subject, its mandates are paramount and supersede all State enactments is equally settled.

In *Ex parte Siebold, 100 U. S. 371, 25 L. Ed. 717, Mr. Justice Bradley* said:

> The clause of the Constitution under which the power of Congress, as well as that of the State Legislatures, to regulate the election of Senators and Representatives arises, is as follows: "The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the place of choosing Senators."
>
> It seems to us that the natural sense of these words is the contrary of that assumed by the counsel of the petitioners. After first authorizing the States to prescribe the regulations, it is added:

"The Congress may at any time, by law, make or alter such regulations." "Make or alter." What is the plain meaning of these words? If not under the prepossession of some abstract theory of the relations between the State and National Governments, we should not have any difficulty in understanding them. There is no declaration that the regulations shall be either wholly by the State Legislatures or wholly by Congress. If Congress does not interfere, of course they may be made wholly by the State; but if it chooses to interfere, there is nothing in the words to prevent its doing so, either wholly or partially. On the contrary, their necessary implication is that it may do either. It may either make the regulations, or it may alter them. If it only alters, leaving, as manifest convenience requires, the general organization of the polls to the State, there results a necessary cooperation of the two governments in regulating the subject. But no repugnance in the system of regulations can arise thence; for the power of Congress over the subject is paramount. It may be exercised as and when Congress sees fit to exercise it. When exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them. This is implied in the power to "make or alter."

* * * * * * * *

So in the case of laws for regulating the elections of Representatives to Congress. The State may make regulations on the subject; Congress may make regulations on the same subject, or may alter or add to those already made. The para-

mount character of those made by Congress has the effect to supersede those made by the State, so far as the two are inconsistent, and no further. There is no such conflict between them as to prevent their forming a harmonious system perfectly capable of being administered and carried out as such.

In *Smiley v. Holm, 285 U. S. 355, 52 Sup. Ct. Rep. 397, 76 L. Ed. 600,* the *Court* said:

> This view is confirmed by the second clause of Article 1, section 4, which provides that "the Congress may at any time by law make or alter such regulations," with the single exception stated. The phrase "such regulations" plainly refers to regulations of the same general character that the legislature of the State is authorized to prescribe with respect to congressional elections. In exercising this power, the Congress may supplement these state regulations or may substitute its own. It may impose additional penalties for the violation of the state laws or provided independent sanctions. It "has a general supervisory power over the whole subject." *Ex parte* Siebold, 100 U. S. 371, 387; *Ex parte* Yarbrough, 110 U. S. 651, 661; *Ex parte* Clarke, 100 U. S. 399; United States v. Mosley, 238 U. S. 383, 386; Newberry v. United States, 256 U. S. 232, 255. But this broad authority is conferred by the constitutional provision now under consideration and is exercised by the Congress in making "such regulations," that is, regulations of the sort which, if there be no overruling action by the Congress, may be provided by the legislature of the State upon the same subject.

And see the other cases cited *supra.*

We think, therefore, that if it were within the power of *Congress* to enact the *Act of August 8, 1911,* and if that Act is still in force, it provides the paramount power in the States to arrange themselves into Congressional Districts.

IV.

The *Act of Congress of August 8, 1911 (Act of August 8, 1911, Ch. 5, Sec. 3, 37 Stat. at L. 14, 2 U. S. C. A. Sec. 3),* is a valid exercise of congressional power and is still in force.

(a) Smiley v. Holm, 285 U. S. 355, 52 Sup. Ct. Rep. 397, 76 L. Ed. 600.
(b) Hume v. Mahan (Dist. Ct. East. Dist. Ky., Sept. 3, 1932, not yet reported).

There may be some contention that the *Act of August 8, 1911,* was repealed and superseded by the *Act of June 18, 1929. Sections 1* and *2* of the *1911 Act* were superseded by the later statute, for they dealt only with the apportionment of representatives under the thirteenth census, but there is nothing in the *1929 Act* that is in conflict with *Section 3* of the *1911 Act.*

In *Smiley v. Holm, 285 U. S. 355, 52 Sup. Ct. Rep. 397, 76 L. Ed. 600,* the *Court,* through *Mr. Chief Justice Hughes,* said:

> The further question has been presented whether the Act of Congress of August 8, 1911, is still in force. The state court held that it was not, that it had been wholly replaced by the Act of June 18, 1929. Sections 1 and 2 of the former Act, making specific provision for the apportion-

ment under the thirteenth census, are of course superseded; that present question relates to the other sections. *These have not been expressly repealed.* The Act of 1929 repeals "all other laws and parts of laws" that are inconsistent with its provisions (sec. 21). The petitioner urges that this Act contains nothing inconsistent with sections 3, 4 and 5 (8) of the Act of 1911, and the only question is whether these sections by their very terms have ceased to be effective. It is pointed out that the provisions of the Act of 1911 were carried into the United States Code. U. S. C., Tit. 2, secs. 2-5. Inclusion in the Code does not operate as a re-enactment; it establishes "*prima facie* the laws of the United States, general and permanent in their nature, in force on the 7th day of December, 1925." Act of June 30, 1926, c. 712, 44 Stat. 1. While sections 3 and 4 of the Act of 1911 expressly referred to "this apportionment" (the one made by that Act), the argument is pressed that they contain provisions setting forth a general policy which was intended to apply to the future creation of congressional districts, and the election of representatives, until Congress should provide otherwise.

There are three classes of States with respect to the number of representatives under the present apportionment pursuant to the Act of 1929, (1) where the number remains the same, (2) where it is increased, and (3) where it is decreased. In States where the number of representatives remains the same, and the districts are unchanged, no question is presented; there is nothing inconsistent with any of the requirements of the Con-

gress in proceeding with the election of representatives in such States in the same manner as heretofore. Section 4 of the Act of 1911 provided that in case of an increase in the number of representatives in any State, "such additional representative or representatives shall be elected by the State at large and the other representatives by the districts now prescribed by law" until such State shall be redistricted. The Constitution itself provides in Article 1, Section 2, that "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States," and we are of the opinion that under this provision, in the absence of the creation of new districts, additional representatives allotted to a State under the present reapportionment would appropriately be elected by the State at large. Such a course, with the election of the other representatives in the existing districts until a redistricting act was passed, would present no inconsistency with any policy declared in the Act of 1911.

Where, as in the case of Minnesota, the number of representatives has been decreased, there is a different situation as existing districts are not at all adapted to the new apportionment. It follows that in such a case, unless and until new districts are created, all representatives allotted to the State must be elected by the State at large. That would be required, in the absence of a redistricting act, in order to afford the representation to which the State is constitutionally entitled, and the general provisions of the Act of 1911 cannot be regarded as intended to have a different import.

This conclusion disposes of all the questions properly before the Court. Questions in relation to the application of the standards defined in Section 3 of the Act of 1911, to a redistricting statute, if such a statute should hereafter be enacted, are wholly abstract. The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

In *Hume v. Mahan (Dist. Ct. East. Dist. Ky., Sept. 3, 1932,* not yet reported) *Judge Cochran* said:

> One of the succeeding paragraphs referred to is paragraph 14, which given Federal Court jurisdiction:
>
> > "Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation under color of any law, statute, ordinance, regulation, custom or usage of any state, of any right, privilege or immunity secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."
>
> In my opinion federal jurisdiction of this cause exists under this provision. It is a suit in equity to redress the deprivation under color of a statute of this state of a right secured by a law of the United States providing for equal rights of its citizens—the right of approximately equal representation in Congress. It is so secured by Section 3 of the Act of August 8, 1911

(37 Stat. 14) which according to my interpretation of the decision in Smiley v. Holm, 285 U. S. 355, is still in force. It provides:

> "In each state entitled under this apportionment to more than one representative, the Representatives to Congress shall be elected by districts composed of a contiguous and compact territory and containing as nearly as practicable an equal number of inhabitants."

This provision was enacted under authority of Section 4 of Article 1 of the Federal Constitution which empowers Congress to make regulations as to the times, places and manner of holding elections for Representatives. Section 2 of the 14th amendment provides for approximately equal representation amongst the several states. The necessary result of such an apportionment is to put the whole body of people in each State on a voting equality with those in every other State; and if, under this plan of apportionment, each State should choose its Representatives in Congress from the State at large, each Congressional voter in each State would not only be on a voting equality in congressional elections with every other vote in his own state, but he would be on an equality with every other such elector in every other State.

Since there is nothing, therefore, in the *Act of June 18, 1929,* which expressly or by necessary implication repeals *Section 3 of the Act of August 8, 1911,* we think it may be taken to be still in force.

V.

The right to make reasonable qualifications for party membership is a political matter with which equity has naught to do. But the right to vote is a legal right that equity will protect.

(a) Grigsby v. Harris, 27 Fed. (2d) 942.
(b) McPherson v. Blacker, 146 U. S. 1, 13 Sup. Ct. Rep. 3, 36 L. Ed. 869.
(c) Nixon v. Herndon, 273 U. S. 536, 47 Sup. Ct. Rep. 446, 71 L. Ed. 759.
(d) Love v. Griffith, 266 U. S. 32, 45 Sup. Ct. Rep. 12, 69 L. Ed. 157.
(e) Nixon v. Condon, 285 U. S. ——, 52 Sup. Ct. Rep. 484, 76 L. Ed. 629.

One of the chiefest positions of those who oppose suits after this fashion is that the basis of the suit is a political fight, and that equity has no jurisdiction to enforce, protect or guide it and we freely admit that were the right sought a purely political right as distinguished from a legal one, equity would have no jurisdiction to entertain any questions of it. (*4 Pomeroy, Equity Jurisprudence, Sec. 1746, Georgia v. Stanton, 6 Wall. 50, 18 L. Ed. 721*). But this is not such a question. It is the assertion of a legal right and an assertion of the right to exercise that right in an ordained way. Much reliance is placed by those who oppose these suits on *Giles v. Harris, 189 U. S. 475, 23 Sup. Ct. Rep. 639, 47 L. Ed. 909,* and of that case *Judge Cochran,* in *Hume v. Mahan* (*Dist. Ct. East. Dist. Ky., Sept. 3, 1932,* not yet reported), said:

The defendant strongly urges that the case of Giles v. Harris, 189 U. S. 175, is conclusive authority for the position that a court of equity has no jurisdiction to enforce a legal right of a political nature. As I view that decision it is an authority to the contrary of this. It upholds the position that a court of equity has such jurisdiction if there is no adequate remedy at law. What is relied on is two expressions of Mr. Justice Holmes in the court of his opinion. He said:

> "The traditional limits of the proceedings in equity have not embraced a remedy for political wrongs."

Again he said:

> "The other difficulty is of a different sort and strikingly reenforces the argument that equity cannot undertake now any more than it has in the past to enforce political rights."

The significance of these expressions will be considered after it is pointed out what was actually decided by the case. It was a suit in equity brought in September, 1902, in the United States Circuit Court for the Northern District of Alabama by a negro against the Board of Registrars of Montgomery Court in that State. The constitution thereof provided for registration in order to vote. It made a difference in the tests for registration before January 1, 1903, from what they were thereafter. The tests prescribed for the prior registration were easier than those for the later. The registration prior to that date was for life. Probably such was the case for the

later. The plaintiff alleges that he was qualified to register under the tests prescribed prior to January 1, 1903. In March, 1902, he applied to the defendants for registration and was refused. Before August 1, 1902, numerous other qualified negroes had so applied and been likewise refused. The bill was filed on their behalf as well as plaintiff. It charged in substance that a scheme had been devised by the great mass of the white population of the State to disfranchise the negroes thereof. The provisions of its constitution as to registration and voting which they had adopted had been so shaped as to give an opportunity for such disfranchisement. The intention was that they should be so administered as to let in all the whites and keep out a large part, if not all, the negroes. The defendants were parties to this scheme and accepted their offices for the purpose of carrying it out. As was intended these provisions had been so administered as to effect this purpose. The plaintiff and the negroes on whose behalf the suit was brought, though qualified to register, had been arbitrarily excluded from registering before January 1, 1903, and the same thing had been done all over the State. On the other hand the white men generally had been permitted to register. The tests prescribed for registration after January 1, 1903, were too severe to permit of the negroes registering thereafter. Furthermore it was the intention of the great mass of the white population to keep the negroes from ever voting. Based on these allegations it was claimed that these provisions of the Constitution of the State were contrary to the federal

constitution. The relief prayed was twofold. In substance it was the defendants be required to enroll the names of plaintiff and the negroes on whose behalf he sued upon the voting lists and that the provisions of the Alabama constitution relating to registration and voting be declared to be contrary to the 14th and 15th amendments of the Constitution of the United States. The lower court dismissed the bill for want of jurisdiction as a federal court and for want of equity. The Supreme Court affirmed this decree. It did not do so for want of federal jurisdiction. It held that such jurisdiction existed. It may be said that it affirmed it on the ground of want of equity. This it did, not because of the political nature of the relief sought, but because plaintiff was not entitled to the relief which he sought. He was not entitled to a declaration that the provisions of the State Constitution in question were unconstitutional and void because it would be "a mere declaration in the air." He was not entitled to the compulsory registration sought for two reasons. One was that according to plaintiff's claim the constitutional provisions as to registration were invalid. The defendants should not be required to proceed to act under an invalid law. The other reason was that such registration would be useless. It would do plaintiff no good. The names of himself and the other negroes on a "piece of paper" would not defeat the intent of the great mass of the white people of the state to keep him from voting. The only possible way in which this could be brought about was for the federal court "to supervise the voting" by its

"officers." This Mr. Justice Holmes said was the "chief purpose" or "main object" of the bill. This relief could not be granted because the state itself could not be sued and the "court had little practical power to deal with the state in a body." He said:

> "Apart from damages to the individuals relief from a great political wrong, if done as alleged, by the people of the state itself must be given by them or by the legislative and political department of the state."

It was for such a political wrong as that charged in the bill, *i. e.*, the disfranchisement of the negroes by the white people of the state, that Mr. Justice Holmes in the first statement relied on by defendant had in mind when he said equity afford no remedy for "political wrongs" and it was the right to be free from such a wrong that he had in mind when he said in the second statement that equity could not enforce "political rights." He did not mean by either statement that equity had no jurisdiction to compel the defendants to register the plaintiff and the negroes on whose behalf he sued because of the political nature of the right sought to be enforced. He assumed as a matter of course that it did have such jurisdiction and hence considered the question on its merits. The right to the relief sought was denied not for want of equitable jurisdiction but for the two reasons stated, to-wit: the registration provisions were invalid and registration would do them no good according to the allegations of the bill. Hence this decision instead of being an authority for the position that equity cannot enforce a

legal right which is of a political nature is a direct authority in support of the position that it can if there is no adequate remedy at law. It is to be noted that Mr. Justice Brewer who dissented on the ground that the decision of the Supreme Court should be limited to the question of federal jurisdiction and the decree reversed and case remanded for further proceeding in the lower court held that the plaintiff was entitled to the relief sought. He said:

> "That such relief will be given has been again and again affirmed in both national and state courts."

And further that Mr. Justice Harlan who dissented on the ground that the decree of the lower court should be affirmed for want of federal jurisdiction said:

> "I agree with Mr. Justice Brewer that it is competent for the courts to give relief in such cases as this."

In *McPherson v. Blacker, 146 U. S. 1, 13 Sup. Ct. Rep. 3, 36 L. Ed. 869,* the question was of the manner of electing Presidential Electors, and in answer to the objection that it was purely a political question, *Mr. Chief Justice Fuller* said:

> It is argued that the subject-matter of the controversy is not of judicial cognizance, because it is said that all questions connected with the election of a Presidential elector are political in their nature; that the court has no power finally to dispose of them; and that its decision would be sub-

ject to review by political officers and agencies, as the state board of canvassers, the legislature in joint convention, and the governor, or, finally the Congress.

But the judicial power of the United States extends to all cases in law or equity arising under the Constitution and laws of the United States, and this is a case so arising, since the validity of the state law was drawn in question as repugnant to such Constitution and laws, and its validity was sustained. Boyd v. Thayer, 143 U. S. 135 (36:103). And it matters not that the judgment to be reviewed may be rendered in a proceeding for mandamus. Hartman v. Greenhow, 102 U. S. 672 (26:271).

As we concur with the state court, its judgment has been affirmed; if we had not, its judgment would have been reversed. In either event, the questions submitted are finally and definitely disposed of by the judgment which we pronounce, and that judgment is carried into effect by the transmission of our mandate to the state court.

The question of the validity of this act, as presented to us by this record, is a judicial question, and we cannot decline the exercise of our jurisdiction upon the inadmissible suggestion that action might be taken by political agencies in disregard of the judgment of the highest tribunal of the State as revised by our own.

In *Love v. Griffith, 266 U. S. 32, 45 Sup. Ct. Rep. 12, 69 L. Ed. 157,* the bill was to enjoin a political committee from enforcing a rule that negroes should not be allowed to vote in a primary election, had already

been held and the question had become moot. For that reason and since no injunction then granted could be made effective the judgment below was affirmed; but in the course of that opinion, *Mr. Justice Holmes,* who delivered the opinion in *Giles v. Harris, supra,* said:

> If the case stood here as it stood before the court of first instance, it would present a grave question of constitutional law and we should be astute to avoid hindrances in the way of taking it up.

In *Nixon v. Herndon, 273 U. S. 536, 47 Sup. Ct. Rep. 446, 71 L. Ed. 759,* the action was at law against certain judges of a Democratic primary election to recover damages, because they had refused to allow plaintiff to vote in that primary. The action was at law, and it was urged against plaintiff's right that the subject matter of the action was purely political. *Mr. Justice Holmes* again writing said:

> The objection that the subject matter of the suit is political is little more than a play upon words. Of course, the petition concerns political action, but it alleges and seeks to recover for private damage. That private damage may be caused by such political act and may be recovered for in a suit at law hardly has been doubted for over two hundred years.

and in support of the holding the Court cited *Wiley v. Sinkler* and *Giles v. Harris, supra,* one an action at law the other a suit in equity showing that the Court

would enforce a legal right whether asserted at law or in equity.

In *Nixon v. Condon, 285 U. S. ——, 52 Sup. Ct. Rep. 484, 76 L. Ed. 629, Mr. Justice Cardozo* said:

> With the problem thus laid bare and its essentials exposed to view, the case is seen to be ruled by Nixon v. Herndon, *supra.* Delegates of the state's power have discharged their official functions in such a way as to discriminate invidiously between white citizens and black. *Ex parte* Virginia, *supra;* Buchanan v. Warley, 245 U. S. 60, 77, 38 S. Ct. 16, 62 L. Ed. 149, L. R. A. 1918C, 210, Ann. Cas. 1918A, 1201. The Fourteenth Amendment, adopted as it was with special solicitude for the equal protection of members of the Negro race, lays a duty upon the court to level by its judgment these barriers of color.

In *Grigsby v. Harris, 27 F. (2d) 942,* the *Court* said:

> Against this view is the excellently reasoned case of Gilmore v. Waples, 108 Tex. 167, 188 S. W. 1037, in which, reviewing the cases for and against, the Supreme Court of Texas declares that, "if there is no provision of law interdicting the proposed action of" a party "committee, no legal right of the plaintiff can be said to be threatened with impairment, and the case presents" but "a party dispute. * * * On the other hand, if the proposed action of the committee is prohibited by law, a judicial question is presented; and, if such action threatens" the legal rights of plaintiff for the relief "of which no * * * legal remedy exists, his right to equitable relief cannot be de-

nied," and he reasons, I think with great power, that, while equity will not grant relief where the right asserted is a political, as opposed to a legal, right, equity will grant relief where the right claimed rests upon law, even though the subject-matter of that right be political, and I incline to think that those cases which have so uniformly affirmed the want of power in a court of equity to grant relief are all cases which either were, or by the court deciding them were held to be, cases where plaintiff's rights were only political, and therefore extra legal. That the political character of the subject-matter of the right could not prevent relief in equity I think more reasonable, and I incline to think, with Mr. Justice Holmes, that "the objection that the subject-matter of the suit is political is little more than a play upon words." Nixon v. Herndon, 273 U. S. 536, 47 S. Ct. 446, 71 L. Ed. 759. And while that expression is used in a law case, his failure in Love v. Griffith, 266 U. S. 33, 45 S. Ct. 12, 69 L. Ed. 157, to suggest the fatal obstacle, that the subject-matter was political, tends to support the view that the Supreme Court of the United States, in a proper case, would agree with the holding of the Supreme Court of Texas, in Gilmore v. Waples, that equity could grant relief.

We venture to think, therefore, that courts of equity in the United States have jurisdiction to protect the fundamental right of suffrage.

CONCLUSION.

This brief has been hurriedly prepared. It does not measure up to our ideas of what a brief should be and contain, and the Court will doubtless discern many imperfections in it, but we ask the indulgence of this Honorable Court, because of the necessary haste involved in its preparation.

We respectfully ask that the decree of the District Court be affirmed.

CLEON K. CALVERT,
Solicitor for Appellee.

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HUGH V. WALL,
ROBERT LEE JONES,
J. H. PRICE,
J. O. S. SANDERS,
CHALMERS COTTER,
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P. C. CANIZARO,
Of Counsel.

Pineville, Kentucky,
October 5, 1932.

FILE COPY

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IN THE

Supreme Court of the United States

October Term, 1932

No. 424

WALKER WOOD, SECRETARY OF STATE, OF STATE OF MISSISSIPPI,

Appellant,

vs.

STEWART C. BROOM,

Appellee.

APPENDIX TO APPELLEE'S BRIEF

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CLEON K. CALVERT, Pineville, Kentucky,
Of Counsel.

The Fraternity Press, Washington, D. C.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF KENTUCKY

Frankfort

JAMES J. HUME, *Plaintiff*

v 1143.

SARA W. MAHAN, *Secretary of State of the Commonwealth of Kentucky, Defendant.*

COCHRAN, District Judge:

This is an action in equity for an injunction against the defendant, the regularly elected, qualified and acting Secretary of State of the Commonwealth of Kentucky, to restrain her from certifying to the county court clerks of the counties comprising the nine congressional districts laid off by the provisions of Chapter 145 of the 1932 Act of the General Assembly of the Commonwealth of Kentucky, under the congressional reapportionment following the fifteenth decennial census, the names of candidates for the nomination of their respective parties for Representatives in Congress in the respective districts so laid off. The basis of the action is that Chapter 145 violates Section 3 of the Act of August 8, 1911 (Title 2, Section 3, U. S. C.) which provides that Representatives in Congress from each state be elected by districts composed of contiguous and compact territory containing as nearly as practicable an equal number of inhabitants.

When the suit was first called to my attention, I was not satisfied in my own mind that the case was one that

might be heard and determined by a district judge, without calling to his assistance two other judges, as provided in Section 266 of the Judicial Code, Section 380, Title 28, U. S. C. A. I accordingly invited Moorman, Circuit Judge and Dawson, District Judge, to sit with me, which they did. Upon the hearing it was assumed by counsel on both sides that the case was one which required a hearing by three judges. Judges Moorman and Dawson are of opinion, however, it is not such a case, but that the matters involved may be determined by the District Judge alone. I am not myself sure that this is not correct. Section 266 of the Judicial Code provides for three judges where the claim is that the statute of a state is unconstitutional. The claim here is not that the legislation in question is unconstitutional, but that it is violative of a federal statute. Hence it is not within the letter of the three judge provision though it may be within the spirit. Cf. Michigan Central Railroad Co. v. Michigan Public Utilities Commission, 271 Fed. 319-321. In deference, therefore, to the views of the judges who sat with me, and in view of my own doubt on the subject, the opinion is handed down as my opinion. In order, however, that the defendants may not be cut off from any right of appeal from the decision herein as three judge decision, if they are of opinion that it is a case that requires a decision of such a court and not one which a single judge is authorized to determine, I am authorized to say that both Judges Moorman and Dawson concur in the results that I have reached, and both have, for the purpose indicated, signed an order in conformity therewith, granting the injunction sought.

The defendant attacks the jurisdiction of this court, as a Federal Court, on the ground that the jurisdictional amount is lacking; and, as a court of equity, on the ground that the matter involved is political in its nature. Each attack will be considered in its order.

Whilst plaintiff's original bill seeks relief both as a taxpayer and as a legally qualified congressional elector, it is quite apparent from the record that plaintiff's interest as a taxpayer is not in excess of $3,000, and if plaintiff is entitled to maintain his action, he must do so in his capacity as a legal voter entitled to participate in congressional elections. It is well settled that the right to vote is a valuable right, capable of being measured in money, and that Federal Courts as such, in a proper case, have jurisdiction to redress deprivation of this right. Wiley v. Sinkler, 179 U. S. 58; Nixon v. Herndon, 273 U. S. 536; Nixon v. Condon, decided by the Supreme Court of the United States May 2, 1932. In the case of

Giles v. Harris, 189 U. S. 475.

it was said:

> "We have recognized too that the deprivation of a man's political and social rights properly may be alleged to involve damage to that amount, capable of estimation in money."

Possibly the right of equal representation in Congress is likewise capable of estimation in money. But the bill and amended bill contain on allegation to the effect that plaintiff's right in this respect exceeds the sum or value of $3,000.00. The original bill does contain an allegation that the amount in controversy exceeds the sum or value of $3,000.00 but a careful reading of the bill discloses that this allegation is made in respect of the costs which would be incurred by the State and counties in holding a congressional election in the alleged illegal districts. Therefore, on the face of the bill and amended bill, if this court as a Federal Court has jurisdiction of this controversy, this jurisdiction must be found in some provision of Section 24 of the Judicial Code (Title 28, Section 41, U. S. C.) which does not make the amount in controversy a jurisdictional requirement. Section 24 of the Judicial Code,

after enumerating certain cases in which the sum or value of the amount in controversy must exceed $3,000.00 contains the following provision:

> "The foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section."

One of the succeeding paragraphs referred to is paragraph 14, which gives Federal Court jurisdiction:

> "Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation under color of any law, statute, ordinance, regulation, custom or usage of any state, of any right, privilege or immunity secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

In my opinion federal jurisdiction of this cause exists under this provision. It is a suit in equity to redress the deprivation under color of a statute of this state of a right secured by a law of the United States providing for equal rights of its citizens—the right of approximately equal representation in Congress. It is so secured by Section 3 of the Act of August 8, 1911 (37 Stat. 14) which according to my interpretation of the decision in

Smiley v. Holm, 285 U. S. 355

is still in force. It provides:

> "In each state entitled under this apportionment to more than one representative, the Representatives to Congress shall be elected by districts composed of a contiguous and compact territory and containing as nearly as practicable an equal number of inhabitants."

This provision was enacted under authority of Section 4 of Article 1 of the federal constitution which empowers Congress to make regulations as to the times, places and manner of holding elections for Representatives. Section 2 of the 14th amendment provides for approximately equal representation amongst the several states. The necessary result of such an apportionment is to put the whole body of people in each State on a voting equality with those in every other State; and if, under this plan of apportionment, each State should choose its Representatives in Congress from the State at large, each Congressional voter in each State would not only be on a voting equality in congressional elections with every other vote in his own state, but he would be on an equality with every other such elector in every other State.

Section 3 of the Act of 1911 enacted pursuant to the Constitution provides for such representation amongst the citizens of the several states. The right thereto is thereby conferred upon them and secured to them.

Until 1842 the respective States were left to their own devices as to the manner of electing Representatives in Congress. Some were elected from the State at large, but in a large part the States were divided by their respective Legislatures into Congressional Districts and their Representatives in Congress were elected from these districts. For the first time, by the Act of June 25, 1842, (5 U. S. Statutes at Large, 491) the Congress asserted its power over the method of selecting its members. Section 2 of that Act required that Congressmen should be elected by districts composed of contiguous territory, but no provision was made for equality of population.

The law continued in this condition until 1872, when Congress, by the Act of January 2, 1872, (17 U. S.

Statutes at Large, 28) added to the requirement of contiguous territory the further requirement that each district should contain as nearly as practicable an equal number of inhabitants, and similar provisions were incorporated in the Act of February 25, 1882 (22 U. S. Statutes at Large 5) and in the Act of February 7, 1891, (26 Statutes at Large, 735). By the Act of February 16, 1901 (31 U. S. Statutes at Large 735) Congress added to the requirement of contiguous territory and equality of population the further requirement that the districts should be compact, and this provision of the Act of 1901 was carried over in identical language into Section 3 of the Act of August 8, 1911 (Title 2, Section 3, U. S. C.).

The defendant contends that Congress was without authority to enact Section 3 of the Act of August 8, 1911 (title 2, Section 3, U. S. C.). As to this there is this to be said. Section 2 of Article 1 of the Constitution, as modified by Section 2 of the Fourteenth Amendment, provides that Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. Section 4 of Article 1 provides:

> "The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations except as to the place of *choosing* Senators."

The contention of defendant is that Section 4 of Article 1 vests in the respective State Legislatures the primary power to provide for the time, place and manner of electing Representatives in Congress, and that this power includes the power of laying off the districts from which Congressmen shall be elected, and that the

authority of the Congress extends only to setting aside or modifying the regulations thus enacted by the respective Legislatures. This question should present no difficulty, even if it were one of first impression. Section 4 of Article 1, giving to the Congress the right by law "to make or alter such regulations" undoubtedly contemplates a power beyond the mere right to modify or alter regulations promulgated through State law; but the matter is no longer an open question. In a long line of decisions by the Supreme Court it has been definitely established that Section 4 of Article 1 vests in the Congress the supreme power to regulate the places and manner of electing Representatives in Congress. This power undoubtedly includes the authority to require Congressmen to be elected from districts of as nearly equal population as practicable and composed of compact and contiguous territory. Whenever the Congress enacts laws governing the election of Congressmen, including, the character of the districts from which they are to be elected, such laws become the supreme law of the land, striking down all State laws in conflict therewith. See: Ex parte Siebold, 100 U. S. 371; Ex parte Yarbrough, 110 U. S. 651; Ex parte Clark, 100 U. S. 399; United States v. Mosley, 238 U. S. 383; In re Clay, 137 U. S. 731; Wiley v. Sinkler, supra, Newberry v. United States, 256 U. S. 232; Smiley v. Holm, decided April 11, 1932, 76 L. ed. 600.

I conclude that Section 3 of the Act of August 8, 1911 (Title 2, Section 3, U. S. C.) was a valid exercise of the authority vested in Congress by Section 4 of Article 1 of the Federal Constitution.

The bill alleges that the Redistricting Act enacted by the last Legislature of this State deprives the plaintiff, a citizen and elector thereof, of the right to approximately equal representation in Congress secured by

Section 3 of the Act of 1911 and the act of defendant there sought to be enjoined will be performed under color of that statute. This suit is brought to redress that deprivation. It is brought to relieve plaintiff of it and to deliver him from it. It is a suit in equity. And it is a "suit authorized by law to be brought." The meaning of the phrase may be met by the consideration that every suit to redress the deprivation of a right is authorized by law to be brought. Where there is a wrong there is a remedy. If its meaning is "authorized by statute to be brought", it is met by Section 43, Title 8, U. S. C. A., Rev. Stat. Sec. 1979, which is in these words:

> "Every person who under color of any statute, ordinance, regulation, custom or usage of any state or territory subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the constitution and laws shall be liable to the party injured in an action at law, suit in equity or other proper proceedings."

The defendant under the color of the Congressional Redistricting Act enacted by the last Legislature of this State is about to take a step and unless enjoined will take it under color of that statute which subjects the plaintiff, a citizen of the United States, to the deprivation of his right to approximately equal representation in Congress secured to him by the federal constitution and laws and a suit in equity against the defendant to enjoin her taking such step is a suit to redress such deprivation i. e., to relieve of it and to deliver him from it.

It would seem to be inescapable, therefore, as to the jurisdiction of this court as a Federal Court that the bill make out a case.

This brings me to the other contention of defendant as to jurisdiction which is that this court has no jurisdiction in equity in this cause. In considering this question two things must be accepted and kept in mind. One is that the plaintiff has the right to approximately equal representation in Congress which right is secured to him by the Constitution and the statute law of the United States. The other is that he has no adequate remedy at law in this court to vindicate such right or to redress its deprivation. He certainly could not successfully maintain a common law action for damages against the precinct election officers in the precinct in which he votes, as was done in the cases of Wiley v. Sinkler, supra; Nixon v. Herndon, supra; and Nixon v. Condon, supra, because no act of theirs, either proximately or remotely, would deprive him of the right asserted in this cause. They had nothing to do with laying off the districts, and no acts of theirs in their official capacity could furnish to him the right of equal representation which he here seeks. The failure to get such equal representation and the failure to obtain the right to vote for a member of Congress in a district composed of contiguous and compact territory could not legally be charged to any dereliction on their part. The same is equally true of the Secretary of State, the defendant in this cause. No act of hers contributed to the establishment of the districts complained of, nor can any official act of hers give to the plaintiff the right which he here seeks.

It was suggested at the argument of this case that the plaintiff did have available to him, however, an adequate legal remedy against the Secretary of State through a mandamus proceeding to compel her to certify all candidates for Congress as candidates from the State at large, rather than by districts laid off by the 1932 General Assembly. Whether such a remedy is available in the State Court, as it is well settled that

Federal District Courts are without jurisdiction to entertain original mandamus proceedings. As the plaintiff in this case is entitled to resort to a Federal Court, the adequate remedy necessary to defeat equitable jurisdiction must be an adequate legal remedy available in the Federal Court.

Unless, therefore, plaintiff can obtain relief in equity he is remediless so far as this court is concerned. It would seem that the very fact that one has a right secured by law which has been invaded and that he has no remedy at law to protect it settles that he has such remedy in equity.

In the case of

Town of Beloit v. Morgan, 7 Wall 613.

> "The power is reserved to a court of equity to act upon a principle often mentioned, namely; that whenever there is a right, it ought to be made effective. 1 Kaime Prin. Eq. 3. Where there is a right which the common law, from any imperfection, cannot enforce it is the province and duty of equity to supply the defect and furnish the remedy. Craig v. Stuyvesant, 2 Paige 92."

And in the cases of

Thompson v. Central Ohio R. R., 6 Wall 134.
Payne v. Hook, 7 Wall 425.

it was said:

> "The absence of a complete and adequate remedy at law, is the only test of equity jurisdiction."

The defendant's contention comes to this, that the federal wrong complained of is one that a federal court is powerless to right—a wrong which Section 41 (14) U. S. C. A. presupposes that it has power to right in equity if not at law. The basis of the contention is that the right sought to be enforced by redressing its deprivation is a political right and a court of equity has no jurisdiction to enforce such a right, even though it

cannot be enforced at law. The decisions involving the question as to jurisdiction in equity, of a case which presents what may be termed a political matter are extremely numerous. There is considerable confusion on the subject amongst them and it may be said that they are in conflict. The time at our disposal will not permit of a survey of them. I think, however, that it will be found on careful consideration of those relied on as denying jurisdiction in such a case that many of them present a matter which is purely political or are cases where there was an adequate remedy at law. My view of the matter is that a political right may at the same time be a legal right. Such a right is a right in a political matter. In case of such a right if it is invaded and there is no dequate remedy at law to protect it equity had jurisdiction to do so.

The defendant strongly urges that the case of
Giles v. Harris, 189 U. S. 175.
is conclusive authority for the position that a court of equity has no jurisdiction to enforce a legal right of a political nature. As I view that decision it is an authority to the contrary of this. It upholds the position that a court of equity has such jurisdiction if there is no adequate remedy at law. What is relied on is two expressions of Mr. Justice Holmes in the court of his opinion. He said:

> "The traditional limits of the proceedings in equity have not embraced a remedy for political wrongs."

Again he said:

> "The other difficulty is of a different sort and strikingly reenforces the argument that equity cannot undertake now any more than it has in the past to enforce political rights."

The significance of these expressions will be considered after it is pointed out what was actually decided by the case. It was a suit in equity brought in September 1902 in the United States Circuit Court for the Northern District of Alabama by a negro against the Board of Registrars of Montgomery Court in that State. The constitution thereof provided for registration in order to vote. It made a difference in the tests for registration before January 1, 1903 from what they were thereafter. The tests prescribed for the prior registration were easier than those for the later. The registration prior to that date was for life. Probably such was the case for the later. The plaintiff alleged that he was qualified to register under the tests prescribed prior to January 1, 1903. In March 1902 he applied to the defendants for registration and was refused. Before August 1, 1902 numerous other qualified negroes had so applied and been likewise refused. The bill was filed on their behalf as well as plaintiff. It charged in substance that a scheme had been devised by the great mass of the white population of the State to disfranchise the negroes thereof. The provisions of its constitution as to registration and voting which they had adopted had been so shaped as to give an opportunity for such disfranchisement. The intention was that they should be so administered as to let in all the whites and keep out a large part, if not all, the negroes. The defendants were parties to this scheme and accepted their offices for the purpose of carrying it out. As was intended these provisions had been so administered as to effect this purpose. The plaintiff and the negroes on whose behalf the suit was brought, though qualified to register, had been arbitrarily excluded from registering before January 1, 1903 and the same thing had been done all over the State. On the other hand the white men generally had been permitted to register. The tests prescribed for registration after January 1, 1903 were too severe to permit of the

negroes registering thereafter. Furthermore it was the intention of the great mass of the white population to keep the negroes from ever voting. Based on these allegations it was claimed that these provisions of the Constitution of the State were contrary to the federal constitution. The relief prayed was twofold. In substance it was that the defendants be required to enroll the names of plaintiff and the negroes on whose behalf he sued upon the voting lists and that the provisions of the Alabama constitution relating to registration and voting be declared to be contrary to the 14th & 15th amendments of the Constitution of the United States. The lower court dismissed the bill for want of jurisdiction as a federal court and for want of equity. The Supreme Court affirmed this decree. It did not so for want of federal jurisdiction. It held that such jurisdiction existed. It may be said that it affirmed it on the ground of want of equity. This it did, not because of the political nature of the relief sought, but because plaintiff was not entitled to the relief which he sought. He was not entitled to a declaration that the provisions of the State Constitution in question were unconstitutional and void because it would be "a mere declaration in the air." He was not entitled to the compulsory registration sought for two reasons. One was that according to plaintiff's claim the constitutional provisions as to registration were invalid. The defendants should not be required to proceed to act under an invalid law. The other reason was that such registration would be useless. It would do plaintiff no good. The names of himself and the other negroes on a "piece of paper" would not defeat the intent of the great mass of the white people of the state to keep them from voting. The only possible way in which this could be brought about was for the federal court "to supervise the voting" by its "officers." This Mr. Justice Holmes said was the "chief purpose" or "main object" of the bill. This relief could not be granted be-

cause the state itself could not be sued and the "court had little practical power to deal with the state in a body." He said:

> "Apart from damages to the individuals relief from a great political wrong, if done as alleged, by the people of the state itself must be given by them or by the legislative and political department of the State."

It was for such a political wrong as that charged in the bill i. e., the disfranchisement of the negroes by the white people of the state, that Mr. Justice Holmes in the first statement relied on by defendant had in mind when he said equity affords no remedy for "political wrongs" and it was the right to be free from such a wrong that he had in mind when he said in the second statement that equity could not enforce "political rights." He did not mean by either statement that equity had no jurisdiction to compel the defendants to register the plaintiff and the negroes on whose behalf he sued because of the political nature of the right sought to be enforced. He assumed as a matter of course that it did have such jurisdiction and hence considered the question on its merits. The right to the relief sought was denied not for want of equitable jurisdiction but for the two reasons stated, to-wit; the registration provisions were invalid and registration would do them no good according to the allegations of the bill. Hence this decision instead of being an authority for the position that equity cannot enforce a legal right which is of a political nature is a direct authority in support of the position that it can if there is no adequate remedy at law. It is to be noted that Mr. Justice Brewer who dissented on the ground that the decision of the Supreme Court should be limited to the question of federal jurisdiction and the decree reversed and case remanded for further proceeding in the lower court held that the plaintiff was entitled to the relief sought. He said:

> "That such relief will be given has been again and again affirmed in both national and state courts."

And further that Mr. Justice Harlan who dissented on the ground that the decree of the lower court should be affirmed for want of federal jurisdiction said:

> "I agree with Mr. Justice Brewer that it is competent for the courts to give relief in such cases as this."

That there is nothing in the two statements of Mr. Justice Holmes relied on adverse to the position here taken and that the decision itself supports it is evident from two subsequent decisions of the Supreme Court in which Mr. Justice Holmes rendered the opinion. One of these decisions was in the case of

Love v. Griffith, 266 U. S. 32.

That case went to the Supreme Court from the Appellate Court of Texas. It was a bill in equity brought by a negro to enjoin the Democratic Executive Committee of Houston and the judges of a primary election to be held January 9, 1921 from enforcing a rule made by the committee that negroes should not be allowed to vote at that election. At the time the case came before the Supreme Court that election had already been held. The decree of the lower court was affirmed, because the question was moot and an injunction would have been worthless. It was not affirmed on the ground that plaintiff was not entitled to the equitable relief which he sought. On the contrary, Mr. Justice Holmes, who delivered the opinion, said:

> "If the case stood here as it stood before the court of first instance, it would present a grave question of constitutional law and we should be astute to avoid hindrances in the way of taking it up."

This expression leads to believe that had the election not been held at the time the Supreme Coure delivered its opinion the political nature of the controversy would not have been regarded by the court as an obstacle to the granting of equitable relief.

The other decision was in the case of

Nixon v. Herndon, 273 U. S. 536.

It also came to the Supreme Court from Texas. It was an appeal from the judgment of one of the federal courts of that state dismissing a complaint brought by a negro against the judges of a Democratic primary election to recover damages for refusing to permit him to vote at that election, such refusal being based on a statute of the state. It was held that the complainant stated a cause of action and the judgment of the lower court was reversed. It was urged against the complaint that it was an action to enforce a political right. As to this Mr. Justice Holmes, who delivered the opinion of the court, said:

> "The objection that the subject matter of the suit is political is little more than a play upon words. Of course, the petition concerns political action, but it alleges and seeks to recover for private damage. That private damage may be caused by such political act and may be recovered for in a suit at law hardly has been doubted for over two hundred years."

It is true that that was an action at law.

But he cited in support of the decision not only the decision in Wiley v. Sinkler, which was a law case also, but that in Giles v. Harris, which was an equity one. He saw no difference in the right to enforce a legal right because it is of a political nature, between an action at law and a suit in equity. Why should it be of any significance in a suit in equity that the legal

right sought to be enforced is of a political nature when it is of no significance in an action at law.

How far the Supreme Court will go in enforcing a legal right of a political nature appears from the later case of

Nixon v. Condon, 285 U. S.

After the decision of the Supreme Court in the case of Nixon v. Herndon the legislature of Texas enacted a statute repealing the earlier one forbidding negroes from voting in a Democratic primary and providing that the state executive committee of every political body in the state should have power to prescribe the qualification of the members of the party and to determine who shall be qualified to vote at its primary. Thereafter the State Democratic Executive Committee adopted a rule limiting the right of participation in primaries to white persons. It was held that thereby that committee was created a state agency and its rule was in violation of the federal constitution and that a negro who had been refused a vote in a Democratic primary had a right of action to recover damages for such refusal.

The position here taken as to equitable jurisdiction is that of the Court of Appeals of Kentucky.

Eugan v. Gerwe, 112 Ky. 232.
Brown v. Garr, 119 Ky. 720.
Neal v. Young, 75 S. W. 1082.
Stiglitz v. Schrader, 239 Ky. 799.
Ragland v. Anderson, 125 Ky. 141.

For the reasons stated, I am constrained to hold that equity is competent to give the relief sought.

I come now to a consideration of the validity of the Re-districting Act.

In dividing the State into Congressional districts under the provisions of Section 3 of the Act of August 8, 1911, the State Legislature undoubtedly has a wide discretion, and its good faith exercise should not be disturbed by the court. But where the result leaves no escape from the conclusion that there was no good faith attempt to comply with the National statutory requirement of practical equality of population and or of contiguous and compact territory, the court should not hesitate to declare the legislative act void. A study of the Redistricting Act here involved satisfies me that the General Assembly made absolutely no effort to comply with the Federal statutory requirement of practical equality of population and no good faith effort to meet the requirement of compactness of territory. Indeed, it is difficult to contemplate the result without concluding that the Act was framed in deliberate disregard of the Federal statute.

The population of the State, according to the 1930 census, is 2,614,589. Under the Congressional Reapportionment Act this population entitled Kentucky to nine Representatives in Congress, instead of eleven as formerly allowed. Under an ideal redistricting act each of these nine districts would contain in round numbers 290,500 inhabitants. Owing to the fact that Jefferson County has a population of 355,550, which is in excess of this number but not enough to make two districts, and owing to the practical considerations against throwing a part of this county into another congressional district, the action of the Legislature in erecting this county into a single district cannot be regarded as a violation of the spirit of the Federal Act.

After the creation of Jefferson County as a congressional district, there were left one hundred and nineteen counties, with a total population of 2,259,239 out

of which to erect the remaining eight congressional districts apportioned to the State. Under an ideal redistricting act each of these eight districts would have in round numbers of a population of 282,400. None of these counties has a population of as much as 100,000. One, Kenton County, has in round numbers 93,500; one, Campbell County has 73,391, and only three others, Fayette, Harlan and Pike, have in excess of 60,000. The average population of the one hundred and nineteen counties outside of Jefferson is slightly less than 19,000 and the average, eliminating the counties of Jefferson, Kenton, Campbell, Fayette, Harlan and Pike, is less than 17,000, and each of seventy-five of the counties has a population of less than this average, and each of twenty-eight of the counties has less than 10,000 population.

In view of this situation, the Legislature was confronted with no difficulty whatever in dividing these one hundred and nineteen counties into eight congressional districts of substantially equal population, and this without the necessity of dividing any county; and the topography of the State presents no obstacle to carving these districts out of contiguous and compact territory. An example of the ease with which these one hundred and nineteen counties can be erected into eight congressional districts, composed of contiguous and compact territory and with substantially equal population, the court, during the argument, called upon counsel for the plaintiff to file a map showing if and how this could be done. Such map was prepared and filed as an exhibit in the case. This map shows that these counties could have been laid off into eight congressional districts with no greater difference in population between them than approximately 4,000 people, and this without doing violence to the requirement that the districts must be composed of compact and contiguous territory. Of course, I do not mean

to intimate that the legislative act should be declared void because it is not in substantial compliance with the tentative districting shown by the map referred to. I simply mean to hold that this tentative districting of the State, as disclosed by the map referred to, clearly shows no real difficulty confronted the Legislature in substantially complying with the Federal Law.

Instead of doing so, however, the Legislature without any reason whatever so far as I can discover, other than the exigencies of practical politics, in redistricting the State worked out a gross inequality in population between the respective districts. To the First District, beginning at the Mississippi River and extending eastwardly between the Ohio River on the North and the Tennessee line on the South, were allotted counties containing a population of 238,189. The Second District, which is the very next district to the East from the First District and which extends from the Ohio River to the Tennessee line, was given a population of 338,117, or substantially 100,000 more population than was assigned to the First District, and substantially 100,000 more population than the Fourth District, which is the district to the East of and adjoining the Second. To the East of the Fourth is the Sixth, containing a population of 317,591, or approximately 80,000 more than either the Fourth or the First. To the South of the Fourth and the Sixth lies the new Ninth with a population of 352,869, or approximately 114,000 more than the population of either the First or the Fourth, and with a population of approximately 107,000 in excess of the new Seventh which adjoins the Ninth on the North and East and has a population of 245,598. The Ninth has a population of approximately 65,000 in excess of the new Eighth, which lies along the eastern boundary line of the State and between the Ohio River and the Seventh, and

more than 112,000 in excess of the new Fifth District, which lies along the Ohio River and north of the central part of the State. The discrimination in population against the Second and Sixth Districts, and in favor of the Fifth, Seventh and Eighth, is only slightly less than glaring. In view of the ease with which these discriminations could have been avoided, we are forced to the conclusion that no attempt was made to avoid them, but that other considerations than the securing of equality of population dictated the laying out of these districts.

Not only did the Legislature disregard the requirement of substantial equality of population, but the new Fifth District, especially outrageously violates the requirement of compactness of territory. Its shape very much resembles a French style telephone, with the counties of Oldham, Trimble, Carroll, Gallatin, Boone, Kenton and Campbell strung along the River forming the handle of the telephone, and the county of Shelby on one end and the counties of Grant and Pendleton, on the other end forming the mouthpiece and receiver respectively. Henry and Oldham and the northern parts of Franklin and Scott counties project, appendix-like between the eastern and western ends of the district. In any good faith attempt to make the Fifth District a compact one, as required by the Federal Statute, Owen and Henry Counties, with a population of 10,710 and 12,564, respectively, certainly would have been included. Irrespective of the inequality of population between the districts, a visual examination of the outlines upon the map of the new Fifth District is sufficient to repel any presumption of a good faith attempt on the part of the Legislature to comply with Section 3 of the Act of August 8, 1911.

The Redistricting Act in its entirtey must, therefore, be declared invalid. As heretofore stated an order con-

forming to the views herein expressed had already been entered.

A. M. J. COCHRAN, *Judge.*

September 3, 1932.

CERTIFIED

(Seal, U. S. Dist. Court, East. Dist. of Kentucky.)

(Signed) S. W. STORY, *Clerk, U. S. Court,*

By Florence Dunham, D. C.

FILE COPY

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CHARLES ELMORE CROPLEY
Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

No. 424

WALKER WOOD, SECRETARY OF STATE OF THE STATE OF MISSISSIPPI, ET AL.,

vs.

STEWART C. BROOM.

MOTION OF THE COMMONWEALTH OF VIRGINIA FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE.

JOHN R. SAUNDERS,
Attorney General,
EDWIN H. GIBSON,
COLLINS DENNY, JR.,
Assistants Attorney General,

ALBERT V. BRYAN,
Counsel for Commonwealth of Virginia as Amicus Curiae.

LEWIS PRINTING CO., INC., RICHMOND, VA.

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No. 424

WALKER WOOD, SECRETARY OF STATE OF THE STATE OF MISSISSIPPI, ET AL.,

vs.

STEWART C. BROOM.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

May it please the Court:

The undersigned, as counsel for the Commonwealth of Virginia, respectfully move this Honorable Court for leave to file the accompanying brief in this case as *Amicus Curiae.*

JOHN R. SAUNDERS,
Attorney General,
EDWIN H. GIBSON,
COLLINS DENNY, JR.,
Assistants Attorney General,

ALBERT V. BRYAN,
Counsel for Commonwealth of Virginia as Amicus Curiae.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

No. 424

WALKER WOOD, SECRETARY OF STATE OF THE STATE OF MISSISSIPPI, ET AL.,

vs.

STEWART C. BROOM.

BRIEF OF AMICUS CURIAE.

PRELIMINARY STATEMENT.

The State of Virginia is interested in the decision of the instant case because of threatened attacks in the Federal courts upon the Reapportionment Act of the 1932 session of the General Assembly of Virginia, by which Act the State of Virginia was divided into nine congressional districts.

A successful attack has been made upon the constitutionality of this Act in the Supreme Court of Appeals

of Virginia upon an allegation that the Act violated both Section 3 of the Act of Congress of August 8, 1911, and Section 55 of the Constitution of Virginia.

Candidates for Congress had been nominated and notices of candidacy had been filed with the Secretary of the Commonwealth of the State of Virginia for election to the Seventy-Third Congress of the United States to represent the districts as provided in the Act of the General Assembly of Virginia. Just before the limit fixed for notification of candidacy for Congress, notices were filed with the Secretary of the Commonwealth by William Moseley Brown and other candidates for Congress as candidates for election as Congressmen-at-large from the State of Virginia, based upon the theory and assumption that the Reapportionment Act of the General Assembly was null and void and that, under the provisions of the Federal law, all Representatives in Congress from the State of Virginia must of consequence be elected at large. Several qualified electors, among whom was the said William Moseley Brown, filed in the Supreme Court of Appeals of Virginia an original petition for a mandamus and injunction, directing and requiring the Secretary of the Commonwealth to certify the names of candidates for Congressmen-at-large and restraining and enjoining him from certifying the names of candidates for Congress from the districts of the State to the electoral boards of the cities and counties, whose duty it is to have printed and distribute to judges of election official ballots for use in the November 8, 1932, election. The Supreme Court of Appeals of Virginia, by its order of the 11th day of October, granted the mandamus and restraining order.

The highest court of our State having passed upon the questions of law involved in the Virginia case, we, there-

fore, desire to be heard in the instant case, the principle of the decision of which must necessarily apply to future Reapportionment Acts of the General Assembly of Virginia, as the decision in the State court indicates that the courts of the respective States will enforce State laws covering apportionment acts.

JURISDICTION OF THE COURTS OF THE UNITED STATES.

We understand that the chief ground upon which counsel for the appellant rely for a reversal of the decision of the lower Federal court is based mainly upon the fact that the amount involved in the litigation is not sufficient to give jurisdiction to the Federal courts. This may be true, although it is not the legal principle of the greatest importance involved in the instant case.

The substantial and material issue is the jurisdiction of the Federal courts in exercising, as is here attempted, a judicial review of State legislation apportioning the representation to which a State is entitled in the House of Representatives of the Congress of the United States. A brief history of Federal apportionment legislation may be of interest.

Until 1842 Congress only provided by law for the number of Representatives to which each State was entitled. In that year an act was passed which provided that States should be divided into districts composed of "contiguous territory."

In 1872 Congress for the first time provided for the creation of districts composed of contiguous territory "containing as nearly as practicable an equal number of

inhabitants." This provision remained in congressional Reapportionment Acts until and including the Act of August 8, 1911. No Apportionment Act was passed following the 1920 census until 1929.

THE ACT OF 1911.

We insist that the Act of 1911 is, by the express provision of its title, limited in effect to the apportionment of Representatives in Congress under the 13th census; that it is not a general law which remains in effect until after it is repealed in whole, or in part, and that the provisions were not operative at the time of the decision of the Mississippi case.

If the Act of August 8, 1911, is in effect, which is denied, we submit that that Act is unconstitutional, as there is no authority vested in Congress by the Constitution of the United States to enact a law regulating the apportionment by Congress of congressional districts. That provision of the Federal Constitution which is supposed to confer power upon Congress is contained in Article 1, Section 4, Paragraph 1, providing:

> "The time, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof, but Congress may at any time, by law, make or alter such regulations except as to the places of choosing Senators."

If this section of the Constitution empowers Congress to prescribe the manner of State apportionment acts, it has been egregiously violated by a majority, if not prac-

tically all, of the States of the Union with impunity. Beginning with 1872, practically the same provision as to equality of population in congressional districts has been carried in apportionment acts. The States have consistently and flagrantly violated the principle of equal district population. So far as we have been able to ascertain, no attack has been made upon State statutes enacting apportionment bills following the principle of equal population until within the last year; certainly no case has reached the Supreme Court of the United States in which allegations of constitutional violations have been charged in the matter of this class of State legislation, upon which that court has passed as to that issue.

Such an eminent constitutional lawyer as Daniel Webster is quoted in the majority report of the Committee on Elections in the Fifty-Fifth Congress in the contested election case of Davison, a Republican, vs. Gilbert, a Democrat. The contest in this case contained as its material basis an attack upon the Apportionment Act of the Kentucky Legislature on account of the fact that the State had been gerrymandered in the interests of the Democrats, and that the population of the districts was so unequal that it violated the acts of Congress providing for practically equal district population. Republicans controlled the Congress and the report was favorable to the Democratic incumbent, based principally upon the conclusion of the committee that State apportionment acts were political in character, discretionary with the Legislature and not subject to congressional review, although Congress is itself given full authority to judge of the election, returns and qualifications of its own members. The quotation from Webster contained in the report in that case follows:

> "Whether the subdivision of the representative power within any state, if there be a subdivision, be equal or unequal, or fairly or unfairly made, Congress can not know and has no authority to inquire. It is enough that the state presents her own representation on the floor of Congress in the mode she chooses to present it. If a state were to give to one portion of her territory a representative for every 25,000 persons, and to the rest a representative only for every 50,000, it would be an act of unjust legislation, doubtless, but it would be wholly beyond redress by any power in Congress, because the Constitution has left all this to the state itself."

There are also quotations in the report from Justice Story, Chancellor Kent, and Mr. Madison in the Federalist, in which these writers concede the right of the States to legislate and express the opinion that Congress can only act where the States have failed to do so. We take it that they refer to an entire and complete failure to provide for congressional representation. Gilbert was allowed to retain his seat.

The only time that this court has had an opportunity to pass upon the authority of Congress was in the very recent Minnesota case of *Smiley* v. *Holm*, ..., which reached this court upon an appeal from a decision of the Supreme Court of Minnesota sustaining apportionment legislation by way of resolution after the act had been vetoed by the Governor. In the opinion in the case by Chief Justice Hughes, this court held the apportionment act invalid because of the fact that it had not received the approval of the Governor as a component of the law-making body of that State. The court refused to pass upon the attack made upon the act because of its alleged violation of the Act of 1911, although the Supreme Court of Minnesota

in 238 N. W. 494 had declared that act inoperative because of the subsequent legislation of June 18, 1929. This court in the *Minnesota Case* held the other questions raised as abstract.

CONSTRUCTION OF THE ACT OF 1911.

The effect of a judgment of this court affirming the lower court not only gives effect to Section 3 of the Act of 1911, but affirms the construction placed upon that Act by the lower court.

We insist that the paramount object of that Act was to provide representation by districts and in a case when choice must be made between the election of Congressmen from districts and the election of Congressmen-at-large from a State, courts must apply such a construction of the statute as will give effect to the mandate of Congress providing for the election of Congressmen from the representative districts. This principle of construction is set out at considerable length, and with great force in the opinion of the majority of the court construing the law of Congress by the Supreme Court of Mississippi in *Broom* v. *Wood*, ... Miss. .....

REPEALS BY IMPLICATION.

While we insist that the Act of 1911 is a special act, limited in application to the election of Representatives in Congress from the several States under the 13th census, we further insist that the Act of June 18, 1929, the title of which reads, "An Act to provide for the fifteenth and

subsequent decennial censuses and to provide for apportionment of Representatives in Congress," is of general character, covers the entire field so far as Congress may legally do so, and controls and limits the jurisdiction of Federal courts, if they have any, to the extent they have such jurisdiction, if any, in considering attacks upon legislative apportionment acts passed by the Legislatures of the respective States.

We also insist that, if the Act of 1911 was a general statute and included legislation covering apportionment of Representatives under future censuses, the purposes of Section 3, as well as 4, 5, and 6, have been repealed by implication by the Act of 1929.

Where an act covers the entire field by legislation relating to one subject, prior legislation is thereby repealed by implication.

Murdock v. *City of Memphis*, 20 Wallace 590;
Cook County National Bank v. *United States*, 107 U. S. 445, 451;
Daviess v. *Fairbaron*, 3 Howard, 636;
Butler v. *Russell*, 4 Fed. Cas. 3243;
Tracey v. *Huffly*, 134 U. S. 206, 223, 36 Cyc. 1077, 1080, 1097.

JURISDICTION OF FEDERAL COURTS CONTROLLED BY ACT OF 1929.

Even though Congress has authority to prescribe the manner and method of State apportionment legislation, we submit that there was not when the instant case was decided in the lower Federal court Federal legislative authority providing such method and manner. The Act

of Congress of 1911, in Section 3 thereof, provided in part:

> " * * * the Representatives * * * shall be elected by districts composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants."

It is under that provision of the statute that the lower Federal court in this case has declared the Mississippi Apportionment Act invalid. The Seventy-First Congress passed Chapter 28 under the title "An Act to provide for the fifteenth and subsequent decennial censuses and to provide for the apportionment of Representatives in Congress." This Act was approved June 18, 1929. U. S. Statutes at Large, Vol. 46, Part 1, p. 21. Title to this Act covers any and all law which was or could have been included in an apportionment regulation.

Included in the original bill, as introduced in Congress and considered in the short session of the Seventieth Congress, was the identical same provision in Section 3 of that bill as is contained in Section 3 of the Act of 1911.

Upon consideration of the bill by the committee of the whole House on the State of the Union on January 10, 1929 (Congressional Record, Vol. 70, Part 11, Seventieth Congress, Second Session, Page 1485), Mr. Lozier, of Missouri (p. 1496 Id.), made the following remarks:

> "Apropos the suggestion of the distinguished gentleman from Pennsylvania (Mr. Graham), I have heretofore called the attention of the House, and the committee that reported the bill, to the provisions of Sections 3, 4 and 5. No man familiar with the Constitution, no man that has even a speaking acquaintance with our organic law, will contend

> for one moment that Sections 3, 4 and 5 have any binding force or effect whatever. The gentleman from Pennsylvania, one of the ablest lawyers in this body, nods his head in approval. Every lawyer, every man that knows anything about the Constitution, knows that these three provisions are violative of the letter and spirit of constitutional mandate. The only power that Congress is given by the Constitution with reference to apportionment of Representatives is to apportion the representation among the several states in proportion to the numbers of population. That duty done, the power of Congress ends, and Congress has no power to determine in what manner the several states exercise their sovereign rights in selecting their Representatives in Congress, and I was glad to hear the gentleman from Pennsylvania (Mr. Graham) indorse what I said on this subject at the last session of Congress on this floor. He says that there is no occasion or need for those provisions. I go further and say that no man who has even a speaking acquaintance with the Constitution will get on this floor and defend the provisions of Sections 3, 4 and 5."

It will thus be seen that Section 3 contained in the original 1929 Act was criticized by Mr. Lozier, of Missouri, and it is apparent from the record that Mr. Graham, of Pennsylvania, acquiesced and agreed with Mr. Lozier in his criticism of that section, and that later on Mr. Dickinson, of Iowa, added to the discussion:

> "Section 3 ought not to be in here, because the states ought to have their own way of making up their apportionment when they know the number of Congressmen they are going to have. (Applause.)"

On the following day and while the bill was still under consideration in its amendatory stage, when Section 3 was reached (C. R. 1604) and the clerk, in the performance of his duty, had read:

> "Section 3. In each state entitled under this Act to more than one Representative, the Representatives to which such state may be entitled in the Seventy-Third and each subsequent Congress shall be elected by districts equal in number to the number of Representatives to which such State may be entitled in Congress, no one district electing more than one Representative. Each such district shall be composed of contiguous and compact territory and contain as nearly as practicable the same number of individuals."

the following appears:

> "Mr. Fenn: 'Mr. Chairman, I move to strike out the section.' The amendment was agreed to."

And in further consideration of the bill, Sections 4, 5 and 6 were stricken therefrom. These sections, while not germane to the principle of equal population contained in Section 3, more clearly indicate the purpose of Congress to absolutely and entirely eliminate Federal laws or regulations of state apportionment legislation. These sections as contained in the bill are quoted:

> "Section 4. In the election of Representatives to the Seventy-Third or any subsequent Congress in any state which under the apportionment provided for in Section 2 of this Act is given an increased number of Representatives, the additional Representative or Representatives apportioned to such

state shall be elected by the state at large, and the other Representatives to which the state is entitled shall be elected as theretofore, until such state is redistricted in the manner provided by the laws thereof, and in accordance with the provisions of Section 3 of this Act.

"Section 5. In the election of Representatives to the Seventy-Third or any subsequent Congress in any state which under the apportionment provided for in Section 2 of this Act is given a decreased number of Representatives, the whole number of Representatives to which such state is entitled shall be elected by the state at large until such state is redistricted in the manner provided by the laws thereof, and in accordance with the provisions of Section 3 of this Act.

"Section 6. Candidates for Representatives at large shall be nominated, unless the state concerned shall provide otherwise, in the same manner in which candidates for governor in that state are nominated."

The foregoing references are to the debates in Congress and the action of the House upon the passage of a reapportionment act, which, after it had passed that body and had been reported favorably by the Senate Committee, failed of passage in the Senate during the short session of the Seventieth Congress.

However, during the first session of the Seventy-First Congress the bill was redrafted in the Senate in the form in which it was passed by both houses of Congress, and was approved June 18, 1929. The members taking a principal part in the consideration of the House Bill, which passed in 1929, but which failed in the Senate,

Mr. Lozier, of Missouri, Mr. Graham, of Pennsylvania, Mr. Dickinson, of Iowa, and Mr. Fenn, were all members of the House of Representatives in the Seventy-First Congress. The same effect, therefore, should be given to the Act of 1929 as covering the whole field of apportionment legislation by Congress as would have been given to the bill which passed the House of Representatives in January of the same year.

DEBATES AND PROCEEDINGS OF CONGRESS.

Objection may be made to the consideration of the facts stated by us as to what took place in the Congress of the United States upon the bill passed by the House of Representatives in January, 1929, and the report of the Senate Committee on that bill.

As a general rule, we agree that, where the language of an act is plain and unambiguous and susceptible of but one construction, it is not appropriate to refer to legislative debates and proceedings. However, debates and reports of committees may be consulted for the purpose of ascertaining the general object of legislation and the evils sought to be remedied. *U. S.* v. *Union Pac. R. Co.*, 91 U. S. 72, 23 L. Ed. 224.

Mr. Justice Brewer, in delivering the opinion of *Holy Trinity Church* v. *U. S.*, 143 U. S. 457, 36 L. Ed. 226, reviewed testimony before congressional committees to determine the purpose of an act on immigration of labor, and cited and quoted from the report of the Senate Committee and said:

> "We find, therefore, that the title of the Act, the evil which was intended to be remedied, the circum-

stances surrounding the appeal to Congress, the reports of the committee of each house, all concur in affirming that the intent of Congress was simply to stay the influx of this cheap, unskilled labor."

U. S. v. *St. P. M. & N. R. Ry.*, 247 U. S. 310;
U. S. v. *Freight Assoc.*, 166 U. S. 290;
McLean v. *U. S.*, 226 U. S. 374.

STATE DECISIONS ON AUTHORITY OF COURTS TO REVIEW APPORTIONMENT ACTS.

In *Wise* v. *Bigger, Clerk*, 79 Va. 269, the Supreme Court of Appeals of Virginia, in a case in which the question of equality of population was involved, held even under a state constitutional provision that districts should be of practically equal population, that the General Assembly of Virginia had discretionary legislative authority which was not subject to review by the courts.

In *Richardson* v. *McChesney, Secretary of State*, 128 Ky. 363, a case involving the inequality of population in districts, the Supreme Court of Kentucky held:

> "In the matter of dividing the state into congressional districts the Legislature, at least so far as the power and authority of this court extend, is supreme. This court has no control over this action. It will be exceeding the power granted us to revise and annul a legislative act relating to a subject over which the Legislature has absolute control."

The principles of law here involved were very carefully and thoroughly considered and the court, though

divided in its opinion, held that the action of the Legislature could not be reviewed by a court.

The same finding was arrived at in the Minnesota case of *State* v. *Holm, supra.* The court in the Mississippi case did not undertake to pass upon the question as to whether or not the Act of Congress of 1911 was in effect. The Minnesota case held that it was not, as it had been repealed or superseded by the Act of 1929, but that, even if it was in effect, the court would not annul the apportionment act passed by the Legislature.

In *Moran* v. *Bowley,* 179 N. E. 526, the Supreme Court of Illinois declared the Act of 1911 in effect and decided that courts had jurisdiction to review apportionment acts of the Legislature.

Brown, et al., v. *Peter Saunders, Secretary of the Commonwealth,* overrules *Wise* v. *Bigger, Clerk, supra.*

CONLUSION.

In conclusion we advert to the fact that Acts of Congress from 1872 until 1911 and, we may say, until the passage of the Act of 1929, a period of fifty-seven years, contain provisions requiring representation in the House of Representatives of the Congress of the United States to be by compact and contiguous districts of practically equal population; that until the year 1931 no court, State or Federal, had undertaken to enforce the provisions of law by proper proceedings until after the passage of the Act of 1929, and that during all these years the Legislatures of most of the states of the Union have exercised without restraint and in a manner violative of the provisions of the act what we contend was the legitimate authority of those bodies to apportion their states into

congressional districts free of the exercise of the judiciary to control their actions.

As the State of Virginia is materially interested in the decision in this case, we submit that the judgment of the lower court be reversed and set aside.

Respectfully submitted on behalf of the Commonwealth of Virginia.

JOHN R. SAUNDERS,
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ALBERT V. BRYAN,
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SUPREME COURT OF THE UNITED STATES.

No. 424.—October Term, 1932.

Walker Wood, Secretary of State of the State of Mississippi, et al., Appellants, *vs.* Stewart C. Broom.	Appeal from the District Court of the United States for the Southern District of Mississippi.

[October 18, 1932.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

Under the reapportionment pursuant to the Act of June 18, 1929 (c. 28, 46 Stat. 21, 26, 27), Mississippi is entitled to seven representatives in Congress, instead of eight as theretofore. The Legislature of Mississippi, by an act known as House Bill No. 197, Regular Session 1932, divided the State into seven congressional districts. The complainant, alleging that he was a citizen of Mississippi, a qualified elector under its laws, and also qualified to be a candidate for election as representative in Congress, brought this suit to have the redistricting act of 1932 declared invalid and to restrain the defendants, state officers, from taking proceedings for an election under its provisions. The alleged grounds of invalidity were that the act violated Article I, Section 4, and the Fourteenth Amendment, of the Constitution of the United States, and Section 3 of the Act of Congress of August 8, 1911 (c. 5, 37 Stat. 13). Defendants moved to dismiss the bill (1) for want of equity, (2) for lack of equitable jurisdiction to grant the relief asked, (3) because on the facts alleged the complainant was not entitled to have his name placed upon the election ballot as a candidate from the State at large, and (4) because the decree of the Court would be inefficacious. The District Court, of three judges, granted an interlocutory injunction, and after answer, which admitted the material facts alleged in the bill and set up the same grounds of defense as the motion to dismiss together with a denial of the unconstitutionality of the challenged act, the Court on final hearing, on bill and answer, entered a final decree making the injunction permanent as prayed. Defendants appeal to this Court. U. S. C., Tit. 28, sec. 380.

The District Court held that the new districts, created by the redistricting act, were not composed of compact and contiguous territory, having as nearly as practicable the same number of inhabitants, and hence failed to comply with the mandatory requirements of Section 3 of the Act of August 8, 1911. Sections 3 and 4 of that Act are as follows:

"Sec. 3. That in each State entitled under this apportionment to more than one Representative, the Representatives to the Sixty-third and each subsequent Congress shall be elected by districts composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants. The said districts shall be equal to the number of Representatives to which such State may be entitled in Congress, no district electing more than one Representative.

"Sec. 4. That in case of an increase in the number of Representatives in any State under this apportionment such additional Representative or Representatives shall be elected by the State at large and the other Representatives by the districts now prescribed by law until such State shall be redistricted in the manner provided by the laws thereof and in accordance with the rules enumerated in section three of this Act: and if there be no change in the number of Representatives from a State, the Representatives thereof shall be elected from the districts now prescribed by law until such State shall be redistricted as herein prescribed."

The Act of August 8, 1911, as its title states, was an act "For the apportionment of Representatives in Congress among the several States under the Thirteenth Census", that is, the census of 1910. The first section of the Act fixed the number of the House of Representatives and apportioned that number among the several States. Its second section related to the allotment of representatives to the territories of Arizona and New Mexico. The third and fourth sections expressly applied to the election of representatives to which the State was entitled "under this apportionment", that is, under the apportionment under the Act of 1911 pursuant to the census of 1910. Substantially the same provisions are found in prior reapportionment acts, the requirements as to compactness, contiguity, and equality in population in the new districts in which representatives were to be elected under the new apportionment being addressed in each case to the election of represenatives "under this apportionment", that is, the apportionment made by the particular act. Act of June 25, 1842, c. 47, sec. 2, 5 Stat. 491; Act of February 2, 1872, c. 11, sec.

2, 17 Stat. 28; Act of February 25, 1882, c. 20, sec. 3, 22 Stat. 5, 6; Act of February 7, 1891, c. 116, secs. 3, 4, 26 Stat. 735, 736; Act of January 16, 1901, c. 93, secs. 3, 4, 31 Stat. 733, 734.

The Act of June 18, 1929, however, in providing for the reapportionment under the Fifteenth Census (none having been made under the Fourteenth Census) omitted the requirements as to the compactness, contiguity, and equality in population, of new districts to be created under that apportionment. It did not carry forward those requirements as previous apportionment Acts had done. There was, it is true, no express repeal of sections 3 and 4 of the Act of 1911 and, as the Act of 1929 did not deal with the subject, it contained no provision inconsistent with the requirements of the Act of 1911. *Smiley* v. *Holm*, 285 U. S. 355, 373. No repeal was necessary. The requirements of sections 3 and 4 of the Act of 1911 expired by their own limitation. They fell with the apportionment to which they expressly related. The inquiry is simply whether the Act of 1929 carried forward the requirements which otherwise lapsed. The Act of 1929 contains no provision to that effect. It was manifestly the intention of the Congress not to reenact the provision as to compactness, contiguity, and equality in population with respect to the districts to be created pursuant to the reapportionment under the Act of 1929.

This appears from the terms of the Act, and its legislative history shows that the omission was deliberate. The question was up, and considered. The bill which finally became the Act of 1929 was introduced in the first session of the 70th Congress and contained provisions similar to those of sections 3 and 4 of the Act of 1911. H. R. 11,725; Cong. Rec., 70th Cong., 1st sess., vol. 69, p. 4054. At the second session of the 70th Congress, the House of Representatives, after debate, struck out these provisions. Cong. Rec., 70th Cong., 2d sess., vol. 70, pp. 1496, 1499, 1584, 1602, 1604. The bill passed in the House of Representatives in that form (*id.* p. 1605) and, although reported favorably to the Senate without amendment (*id.* 1711), did not pass at that session. The measure as to reapportionment was reintroduced in the Senate in the first session of the 71st Congress in the form in which it had passed the House of Representatives, and had been favorably reported to the Senate in the preceding Congress, that is, without the requirements as to compactness, contiguity, and equality in population, which had been

deleted in that Congress. S. 312, 71st Cong., 1st sess., Cong. Rec. vol. 71, pp. 254, 2450. And, when, after the passage of this bill in the Senate, it was before the House of Representatives, and an effort was made to amend the bill so as to make applicable the requirements of section 3 of the Act of 1911 with respect to the districts to be created under the new apportionment, the amendment failed. The point of order was sustained that, as the pending bill did not relate to redistricting of the States by their legislatures, the amendment was not germane. Cong. Rec., 71st Cong., 1st sess., vol. 71, pp. 2279, 2280, 2363, 2364, 2444, 2445. The bill was then passed without the requirements in question. Cong. Rec., 71st Cong., 1st sess., vol. 71, p. 2458.

There is thus no ground for the conclusion that the Act of 1929 reenacted or made applicable to new districts the requirements of the Act of 1911. That Act in this respect was left, as it had stood, and the requirements it had contained as to the compactness, contiguity and equality in population of districts, did not outlast the apportionment to which they related.

In this view, it is unnecessary to consider the questions raised as to the right of the complainant to relief in equity upon the allegations of the bill of complaint, or as to the justiciability of the controversy, if it were assumed that the requirements invoked by the complainant are still in effect. See *Ex parte Bakelite Corporation*, 279 U. S. 438, 448. Upon these questions the Court expresses no opinion.

The decree is reversed and the cause is remanded to the District Court with directions to dismiss the bill of complaint.

It is so ordered.

Mr. Justice BRANDEIS, Mr. Justice STONE, Mr. Justice ROBERTS and Mr. Justice CARDOZO are of opinion that the decree should be reversed and the bill dismissed for want of equity, without passing upon the question whether Section 3 of the Act of August 8, 1911 is applicable. That question was not presented by the pleadings or discussed in either of the opinions delivered in the District Court. — F. (2d) —. It was not mentioned in the Jurisdictional Statement filed under Rule 12 or in the briefs of the parties filed here. So far as appears, all the members of the lower court and both parties have assumed that Section 3 is controlling.